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IN THE

Supreme Court of the United States

AMERICAN CIVIL LIBERTIES UNION, ET AL.,
Petitioner,

—v.—

NATIONAL SECURITY AGENCY, ET AL.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MICHAEL J. STEINBERG
KARY L. MOSS
American Civil Liberties
Union Fund of Michigan
60 West Hancock Street
Detroit, MI 48201-1343
(313) 578-6814

RANDAL L. GAINER
KRISTINA SILJA BENNARD
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
(206) 628-7660

JAMEEL JAFFER
Counsel of Record
MELISSA GOODMAN
STEVEN R. SHAPIRO
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that plaintiffs who have been injured because of government surveillance are precluded from challenging the lawfulness of that surveillance if the government refuses to disclose whether plaintiffs' communications have been intercepted.

2. Whether the President possesses authority under Article II of the Constitution to engage in intelligence surveillance within the United States that Congress has expressly prohibited.

PARTIES TO THE PROCEEDINGS

The petitioners in this case are the American Civil Liberties Union, American Civil Liberties Union Foundation, American Civil Liberties Union of Michigan, Council on American-Islamic Relations, Council on American-Islamic Relations Michigan, Greenpeace, Inc., National Association of Criminal Defense Lawyers, James Bamford, Larry Diamond, Christopher Hitchens, Tara McKelvey, and Barnett R. Rubin.

The respondents are the National Security Agency / Central Security Service, and Lieutenant General Keith B. Alexander, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioners confirm that none of the petitioners have parent companies nor do any publicly held companies own ten percent or more of their stock.

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The American Civil Liberties Union *et al.* respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 493 F.3d 644 (6th Cir. 2007) and reprinted in the Appendix ("App.") at 66a-235a. The opinion of the district court is reported at 438 F.Supp.2d 754 (E.D. Mich. 2006) and reprinted in the Appendix at 1a-62a.

JURISDICTION

The Court of Appeals entered its judgment on July 6, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The underlying complaint raises claims under the Administrative Procedures Act ("APA"), 5 U.S.C. § 551 *et seq.*, the principle of separation of powers, and the First and Fourth Amendments. The claims raised under the APA and the principle of separation of powers relate to alleged violations of the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1801 *et seq.* (2006), and Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), 18 U.S.C. § 2510, 2522 *et seq.* The relevant provisions of FISA and Title III are reprinted in the Appendix at 236a-241a. The Protect America Act of

2007 ("PAA"), Pub. L. No. 110-55, 121 § 552 (2007), which amended FISA and which President Bush signed into law on August 5th, 2007, is reprinted in the Appendix at 260a-264a.

STATEMENT OF THE CASE

A. The NSA Program and Commencement of This Lawsuit.

In the fall of 2001, President Bush secretly authorized the National Security Agency ("NSA") to inaugurate a program of warrantless electronic surveillance within the United States (the "Program").[1] President Bush publicly acknowledged the Program after the *New York Times* reported its existence in December 2005.[2] Since December 2005, senior government officials have explained the nature and scope of the Program in significant detail.[3] According to their public statements, the

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[1] James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005.

[2] Court of Appeals Joint Appendix ("C.A. App.") 81 (President's Radio Address, 41 Weekly Comp. Press. Doc. 1880, Dec. 17, 2005 (hereinafter "President's Dec. 17 Radio Address")).

[3] C.A. App. 112 (*Hearing Before the S. Judiciary Committee on the Wartime Executive Power and the NSA's Surveillance Authority*, 109th Cong. (2006) (hereinafter "Senate Judiciary Hearing")); C.A. App. 84 (Press Briefing by Attorney Gen. Alberto Gonzales & General Michael Hayden, Dec. 19, 2005, *available at* http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html, (hereinafter "Gonzales & Hayden Dec. 19 Press Briefing")); C.A. App. 92 (General Michael Hayden, Address to the National Press Club, Jan. 23, 2006, *available at*

Program involved the interception of e-mails and telephone calls that originated or terminated inside the U.S.[4] The interceptions were not predicated on judicial warrants or any other form of judicial authorization,[5] nor were they predicated on any determination of criminal or foreign-intelligence probable cause.[6] Instead, NSA "shift supervisors"[7] initiated surveillance when in their judgment there was a "reasonable basis to conclude that one party to the communication [was] a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda."[8]

The Program operated in violation of statutory law, and the two judges who have considered the question in the course of the instant lawsuit have both reached this conclusion. Congress has provided that the government can conduct electronic surveillance within the United States only if it

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http://www.dni.gov/speeches/20060123_speech.htm (hereinafter "Hayden Jan. 23 Press Briefing").

[4] C.A. App. 81 (President's Dec. 17 Radio Address); C.A. App. 84 (Gonzales & Hayden Dec. 19 Press Briefing).

[5] C.A. App. 81 (President's Dec. 17 Radio Address; C.A. App. 84 (Gonzales & Hayden Dec. 19 Press Briefing); C.A. App. 112 (Senate Judiciary Hearing).

[6] C.A. App. 84 (Gonzales & Hayden Dec. 19 Press Briefing); C.A. App. 92 (Hayden Jan. 23 Press Briefing); C.A. App. 112 (Senate Judiciary Hearing).

[7] C.A. App. 84 (Gonzales & Hayden Dec. 19 Press Briefing, Statement of Gen. Hayden).

[8] *Id.* (Statement of Attorney Gen. Gonzales).

complies with FISA and Title III. 18 U.S.C. § 2511(2)(f). Both statutes generally prohibit electronic surveillance except with prior judicial authorization based on probable cause. 18 U.S.C. § 2518(3); 50 U.S.C. § 1805 (2006), and Congress has provided civil and criminal penalties for those who violate the statutes' proscriptions. 18 U.S.C. §§ 2511, 2520; 50 U.S.C. §§ 1809, 1810 (2006). Together, FISA and Title III provide the "exclusive means" by which the executive branch can lawfully engage in electronic surveillance within the nation's borders. 18 U.S.C. § 2511(2)(f).

Petitioners are prominent attorneys, journalists, scholars, and national advocacy organizations whose work requires them to communicate by telephone and e-mail with likely targets of the government's warrantless surveillance activities. They commenced this suit on January 17, 2006, asserting claims under the APA, the principle of separation of powers, and the First and Fourth Amendments. On March 9, 2006, plaintiffs moved for partial summary judgment seeking a declaration that the NSA's warrantless wiretapping activities were unlawful and seeking an injunction to stop those activities.[9] In support of their motion, plaintiffs submitted, *inter alia*, the declaration of Nancy Hollander, a criminal defense attorney and a member of plaintiff National Association of Criminal Defense Lawyers ("NACDL"). Hollander, like many

[9] Plaintiffs' complaint also raised claims with respect to the NSA's "datamining" activities but plaintiffs did not move for summary judgment on those claims. The datamining claims were dismissed by the district court and are not at issue here.

other members of NACDL, represents defendants accused of terrorism-related crimes and her representation of these defendants requires her to communicate by telephone and e-mail with fact witnesses, experts, co-counsel, and investigators located overseas. App. 283a-286a (Hollander Decl. ¶¶ 12-15, 18-19, 21-23). Because of her concern that the government was monitoring her communications under the Program, Hollander ceased engaging in certain communications important to the representation of her clients and took expensive and time-consuming trips abroad to obtain information that she would otherwise have obtained by telephone or e-mail. App. 283a-287a (*Id.* ¶¶ 13, 16-17, 20, 23-25). Hollander believed these measures were necessary to protect the confidentiality of her clients' information, including information covered by the attorney-client privilege. App. 283a-287a (*Id.* ¶¶ 12, 16, 20, 23, 25).

Plaintiffs also submitted the declaration of Nabih Ayad, a criminal defense attorney and member of plaintiff ACLU of Michigan. Ayad, like Hollander, represents defendants accused of terrorism-related crimes and his representation of these defendants requires him to obtain information from individuals overseas, including individuals suspected of being affiliated with terrorist groups. App. 325a-329a (Ayad Decl. ¶¶ 5-9, 11). Some individuals from whom he otherwise would have been able to obtain information had refused to communicate with him directly because they feared that their communications were being monitored under the Program. App. 326a (*Id.* ¶ 6). The Program also caused him to forgo privileged

communications important to the representation of his clients. App. 326a-326a, 328a (*Id.* ¶¶ 4, 6-9). Like Hollander, Ayad believed that the measures he had taken were necessary to protect the confidentiality of his professional communications, including those protected by the attorney-client privilege. App. 326a, 327a (*Id.* ¶¶ 4, 7).

To underscore that the attorney-plaintiffs had acted reasonably in taking measures to protect the confidentiality of their professional communications, plaintiffs submitted the declaration of ethics expert Leonard Niehoff. Professor Niehoff declared that "[p]rofessional responsibility rules generally require an attorney to maintain as confidential information that relates to the representation of the client"; that this ethical obligation "is expansive and is substantially broader than the attorney-client privilege"; and that the Program imposed an "immediate, substantial, and gravely serious burden upon the representation being provided by [the plaintiff] attorneys to their clients." App. 334a-335a (Niehoff Decl. ¶¶ 12, 16). Prof. Niehoff explained:

> The [Program] requires the attorneys to cease – immediately – all electronic and telephonic communications relating to the representation that they have good faith reason to believe will be intercepted. And the [Program] requires the attorneys to resort – immediately – to alternative means for gathering information.

App. 336a (*Id.* ¶ 19).

The government responded to plaintiffs' motion by seeking dismissal of the entire action on the basis of the state secrets privilege. The government did not contest plaintiffs' declarations or their statement of undisputed facts.[10]

B. The District Court's Decision

The district court (Taylor, J.) issued a decision on August 17, 2006 granting plaintiffs' motion for partial summary judgment. App. 1a.[11] The court rejected the government's argument that the case was non-justiciable under *Totten v. United States*, 92 U.S. 105 (1875), and *Tenet v. Doe*, 544 U.S. 1 (2005), finding that the rule of those cases was limited to disputes concerning secret espionage agreements. App. 16a. While the court found that the government had "appropriately invoked" the state secrets privilege over certain information relating to the Program, App. 16a, it determined that plaintiffs could prove both their standing and their claims on the basis of information that the government had

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[10] In addition to the declarations of Hollander, Ayad, and Nicholl, plaintiffs filed declarations of attorneys Mohammed Abdrabboh, Joshua L. Dratel, and William W. Swor; journalist Tara McKelvey; and scholars Larry Diamond and Barnett R. Rubin. The declarations are reprinted in the Appendix at 205a-278a, 289a-313a, 319a-323a.

[11] The court granted defendants' motion to dismiss plaintiffs' claims relating to datamining, finding that plaintiffs could not "establish a *prima facie* case to support their datamining claims without the use of privileged information" and that "further litigation of this issue would force the disclosure of the very thing the privilege [was] designed to protect." *Id.* at 76a. As noted above, *see supra* note 9, the datamining claims were dismissed and are not at issue here.

already acknowledged publicly. App. 19a. The court also found that the information over which the government had invoked the state secrets privilege was unnecessary to any valid defense. App. 20a-21a.[12] It noted that the government had "repeatedly" assured the public that there was a "valid basis in law" for the Program and that the government had "supported [its] arguments without revealing or relying on any classified information." App. 20a.

The court found that plaintiffs had standing to challenge the Program because they were suffering "a concrete, actual inability to communicate with witnesses, sources, clients and others without great expense which [had] significantly crippled [them], at a minimum, in their ability to report the news and competently and effectively represent their clients." App. 28a. The court also found, on the basis of information that had been publicly confirmed by the government, that the Program violated FISA and the principle of separation of powers. App. 53a. Because the Program operated without judicial oversight, the court found that the Program violated the First and Fourth Amendments as well. App. 44a-47a. The court thus enjoined the government from conducting electronic surveillance without complying with FISA. App. 61a, 64a.

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[12] The court reviewed both publicly filed and classified versions of the declarations of Director of National Intelligence John D. Negroponte and NSA Signal Intelligence Director Major General Richard J. Quirk. App. 16a, 20a-21a.

C. The Suspension of the Program and the Sixth Circuit's Decision.

The government filed a notice of appeal on August 17, 2006, and the Sixth Circuit granted a stay pending appeal. On January 17, 2007, just two weeks before oral argument in the Sixth Circuit, then-Attorney General Gonzales announced that a judge of the Foreign Intelligence Surveillance Court ("FISC") had issued orders authorizing certain surveillance that had previously been conducted without judicial oversight and that, as a result, the President had "determined not to reauthorize" the Program. Letter from Attorney General Alberto R. Gonzales to Hon. Patrick Leahy & Hon. Arlen Specter, Jan. 17, 2007. In a supplemental filing with the Sixth Circuit, however, the government "continue[d] to maintain that the [Program] was lawful," *ACLU v. NSA* Nos. 06-2095, 06-2140, Dkt. No. 89, at 7 n.4 (6th Cir., Jan. 24, 2007) (Government's Supplemental Submission Discussing the Implications of the Intervening FISA Court Orders of January 10, 2007), and indicated that the President might "renew[ ]" the Program "after a hypothetical modification of the FISA orders," *id.* at 11. As discussed in Section III below, the President continues to assert the authority to disregard FISA at any time.

A divided Court of Appeals reversed. Judges Batchelder and Gibbons, writing separately, concluded that plaintiffs lacked standing. In Judge Gibbons's view, the entire case turned on a fact that plaintiffs had not established and could not establish without access to information protected by the state secrets privilege – namely, that their

communications had been monitored under the Program. App. 159a (Gibbons, J., concurring). Judge Batchelder addressed each of plaintiffs' claims individually but arrived at essentially the same conclusion. App. 93a-109a (Batchelder, J., addressing plaintiffs' First Amendment claim); App. 123a-126a (addressing plaintiffs' Fourth Amendment claim); App. 126a-132a (addressing plaintiffs' separation of powers claim). She found, in addition, that under this Court's decision in *Laird v. Tatum*, 408 U.S. 1 (1972), plaintiffs would not have standing to bring their First Amendment claim even if they *could* prove that they had been monitored under the Program, because the Program was not "regulatory, proscriptive, or compulsory in nature." App. 102a. She also found that plaintiffs could not prove causation or redressability, because in her view plaintiffs' injury stemmed not from the Program but from government surveillance more generally, App. 112a-113a; App. 121a, and in any event the injury was either "self-imposed," App. 100a, or caused by the "independent decisions of [plaintiffs'] third-party overseas contacts." App. 116a.[11]

Judge Gilman, dissenting, found that plaintiffs had standing. Addressing Judge Batchelder's reliance on *Laird v. Tatum*, Judge Gilman wrote:

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[11] Judge Batchelder also found that plaintiffs could not sue under the APA because the Program did not constitute "final agency action" within the meaning of that statute, App. 136a, and that plaintiffs could find no recourse in Title III's exclusivity provision because they had not established that the Program involved "electronic surveillance" within the meaning of FISA, App. 148a.

> In contrast to *Laird*, the attorney-plaintiffs here complain of specific present harms, not simply of some generalized fear of the future misuse of intercepted communications. The TSP forces them to decide between breaching their duty of confidentiality to their clients and breaching their duty to provide zealous representation. Unlike the situation in *Laird*, the attorney-plaintiffs in the present case allege that the government is listening in on private person-to-person communications that are not open to the public. These are communications that any reasonable person would understand to be private. The attorney plaintiffs have thus identified concrete harms to themselves flowing from their reasonable fear that the TSP will intercept privileged communications between themselves and their clients.

App. 180a (Gilman, J., dissenting). Judge Gilman found that the measures the plaintiff-attorneys had taken to protect the confidentiality of their professional communications were reasonable, and that "the 'reasonableness of the fear' of the attorney plaintiffs [was] well beyond what is needed to establish standing to sue." App. 184a [14]

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[14] Because Judge Gilman found that the attorney-plaintiffs had standing, he found it unnecessary to determine whether the other plaintiffs had standing as well. App. 174a ("The position of the attorney plaintiffs, in my opinion, is the strongest for the

On the merits, Judge Gilman found that the Program clearly violated FISA. App. 219a ("Congress has . . . unequivocally declared that FISA and Title III are the exclusive means by which electronic surveillance is permitted"). He rejected the government's contention that Congress had authorized the Program when it passed the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001), noting that the AUMF nowhere mentioned electronic surveillance whereas FISA addressed it exhaustively. App. 222a-227a (Gilman, J., dissenting). After determining that the Program violated statutory law, Judge Gilman applied the framework set out by Justice Jackson in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (Jackson, J., concurring), determined that the President's authority was at its "lowest ebb," and concluded that the Program violated the principle of separation of powers. App. 231a.

D. Developments Since the Sixth Circuit's Decision.

In the spring of 2007, administration officials began to lobby Congress to amend FISA to permit the kinds of electronic surveillance that the NSA had, prior to January of that year, been conducting in violation of that statute.[16] Legislation was

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purpose of the standing analysis. This is not to say that the journalists and scholars do not have standing. They might. But because only one plaintiff need establish standing, I will focus my discussion on the attorney plaintiffs."]

[16] The administration's decision to seek amendments to FISA was apparently motivated by a May FISC ruling that modified

introduced late in the summer. After four days of primarily closed-door debate, Congress enacted the PAA in August 2007. The PAA allows the government to conduct warrantless electronic surveillance if the surveillance is "directed at" or "concerns" someone reasonably believed to be outside the United States. App. 251a (PAA § 2). The FISA Court's role is limited to reviewing the reasonableness of the procedures used by the executive to determine whether individuals are outside the United States, and even this review is for "clear[] erro[r]." App. 259a (PAA § 3). In sum, the PAA gives the government broad authority to intercept Americans' communications but at the same time narrows the role of the FISC in overseeing that surveillance. The PAA was enacted as a temporary measure, however, and unless Congress enacts reauthorizing legislation it will sunset in February 2008. *Id.* (PAA. § 6(c)). Further, as discussed in Section III below, even if the PAA is reauthorized, executive branch officials have already insisted that the President has the authority to disregard it insofar as it constrains his ability to conduct foreign intelligence surveillance that he considers necessary.

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or vacated the orders that a FISC judge had issued in January. *See* Transcript, Debate on the Foreign Intelligence Surveillance Act, El Paso Times, Aug. 22, 2007; Greg Miller, *Court Puts Limits on Surveillance Abroad*, L.A. Times, Aug. 2, 2007.

REASONS FOR GRANTING THE PETITION

For more than five years, the President authorized and defendants operated a far-reaching and intrusive program of warrantless electronic surveillance within the nation's borders. The Program operated in violation of statutory law. In defense of his decision to inaugurate the Program, the President claimed the authority to violate *any* statute if he concludes that it interferes with his power under Article II to protect the nation during a time of war. He has made this claim repeatedly and continues to stand by it today. This claim, which challenges the very foundations of our constitutional democracy, should not go unreviewed by the courts.

The record shows that plaintiffs here have suffered concrete professional harms because of the Program. They continue to suffer professional harms to the extent executive branch officials are conducting surveillance under the PAA without meaningful judicial review. Based on a misreading of this Court's precedent, the decision below renders these harms irremediable and the President's claim of authority unchallengeable. While the legislative landscape has changed since plaintiffs filed this suit, the issues presented here remain live and indeed extraordinarily pressing. The PAA invests the President with sweeping authority to monitor the communications of U.S. citizens and residents, but the Sixth Circuit's theory of standing forecloses petitioners from amending their complaint to challenge the constitutionality of that act. In addition, the President continues to claim the authority to disregard *any* Congressional enactment, including the PAA, that regulates his power to collect

foreign intelligence. If the Sixth Circuit's decision is left in place, the President will be able to disregard whatever statutory restrictions on foreign intelligence that Congress enacts. For these reasons and the further reasons discussed below, the questions presented by this petition warrant this Court's review.

I. The Extent to Which Statutory and Constitutional Limits on Government Surveillance are Judicially Enforceable is an Issue of Overriding Importance.

Two members of the Sixth Circuit panel held that litigants cannot challenge the lawfulness of a government surveillance program unless they can establish with certainty that they have been monitored under it. Aside from being inconsistent with this Court's standing jurisprudence (a point discussed in Section II below), the panel's decision gives the executive branch the ability to shield its surveillance activities from judicial review simply by refusing to disclose the identities of those whom it has monitored. It should not be left to the executive branch alone to determine what legal limitations apply to government surveillance and whether those limits are being observed. The courts have a critical and constitutionally mandated role to play in ensuring that government surveillance is conducted in compliance with statutory law and the Constitution.

History amply demonstrates the dangers of government surveillance that is not subject to meaningful regulation or judicial oversight. Indeed,

it was in part this history that motivated Congress to enact FISA in 1978. During the 1950s, 60s, and 70s, the FBI routinely installed electronic surveillance devices on private property to monitor the conversations of suspected communists. *See* S. Rep. 95-604, at 11 (1977), reprinted in 1978 U.S.C.C.A.N. 3904, 3909. The FBI's COINTELPRO, authorized by President Nixon in the 1970s, wiretapped Martin Luther King, Jr., and other civil rights and anti-war activists solely because of their political beliefs. *See generally Intelligence Activities and the Rights of Americans*, Book II, Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, United States Senate, S. Rep. No. 94-755, 96 (1976) (hereinafter "Church Comm. Book II"). The CIA illegally surveilled as many as 7,000 Americans in Operation CHAOS, including individuals involved in the peace movement, student activists, and black nationalists. *See generally Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982). After years of investigating such practices, the Church Committee concluded that "[u]nless new and tighter controls are established by legislation, domestic intelligence activities threaten to undermine our democratic society and fundamentally alter its nature." Church Comm. Book II, at 2.

This Court has similarly recognized the dangers of unchecked government surveillance. *See, e.g., Berger v. New York*, 388 U.S. 41, 62-63 (1967) ("[W]e cannot forgive the requirements of the Fourth Amendment in the name of law enforcement. . . . Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices.");

United States v. United States Dist. Court for the Eastern Dist. of Michigan ("*Keith*"), 407 U.S. 297, 314 (1972) ("The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society."). In *Keith*, the Court described the risks presented by surveillance conducted in the name of national security:

> National security cases . . . often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crimes. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. . . . The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.' Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.

Id. at 313-14.

The dangers that this Court identified in *Berger* and *Keith* are now presented even more starkly because the government's covert surveillance activities have increased dramatically. The

government submitted more than twice as many surveillance applications to the Foreign Intelligence Surveillance Court in calendar year 2006 than it did in calendar year 2000. In 2003, FISA wiretap applications for the first time exceeded the total number of Title III wiretaps by federal and state authorities combined. *See* Rebecca Carr, *Terror Wiretaps Exceed Criminal Wiretaps for First Time*, Palm Beach Post, May 10, 2004. In March 2007, the Justice Department's Inspector General reported that the FBI had issued more than 140,000 national security letters between 2003 and 2005 – according to news reports, a "hundredfold increase over historic norms." Barton Gellman, *The FBI's Secret Scrutiny*, Wash. Post, Nov. 6, 2005. The additional surveillance that the President conducted under the Program, of course, is not accounted for in any publicly available statistic.

Judicial oversight is crucial to ensuring that government surveillance remains subject to democratic control. By erecting a new and nearly insuperable barrier to suits challenging such surveillance, the Sixth Circuit has severely limited the circumstances in which this oversight will be available. More troubling still, the Sixth Circuit's decision effectively invests executive branch officials with the ability to determine which surveillance activities will be subject to judicial review and which will not. Congress is currently debating further changes to FISA, but restrictions on government surveillance – whether statutory or constitutional – will be meaningless if, as the Sixth Circuit has effectively held, courts are left with no meaningful role in construing FISA and determining whether the

executive branch is complying with the statute. As this Court has recently said, "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion). This Court should grant review to ensure that government surveillance remains subject to the oversight of the courts.

II. The Court Should Grant Review to Clarify the Circumstances in Which Litigants Have Standing to Challenge Acknowledged Government Surveillance Activities.

Because the last six years have seen a dramatic expansion in the government's surveillance activities, it is critically important for this Court to address the question of who has standing to challenge the lawfulness of government surveillance. There is considerable confusion in the lower courts on this issue. Some courts have applied this Court's traditional standing rules – requiring plaintiffs to show a concrete injury traceable to the surveillance and redressable by a favorable decision. Other courts, however, departing from the standing framework that this Court has applied in other contexts, have disregarded evidence of concrete injury and denied standing unless plaintiffs are able to establish with certainty that they have in fact been monitored under the surveillance program they seek to challenge. As discussed above, this showing

is often impossible to make because the government refuses, by invoking the state secrets privilege, to confirm or deny whether the plaintiffs have been monitored. Through the combination of standing requirements and the state secrets doctrine, the government is given the ability to insulate its surveillance activities from judicial scrutiny. This Court should grant review to clarify the circumstances in which litigants can challenge government surveillance programs.

The Court has held that litigants seeking to invoke the authority of federal courts must show they have suffered injuries traceable to the defendants' challenged conduct and likely to be redressed by a favorable decision. *See, e.g. Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The injury requirement is satisfied if plaintiffs can demonstrate that they have suffered concrete and particularized harm that is actual or imminent rather than conjectural or hypothetical. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000); *Lujan*, 504 U.S. at 560. The injury requirement "cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Rather, the requirement must be understood in light of the purpose of the standing inquiry – to ensure that the plaintiff has "alleged such a personal stake in the outcome of the controversy as to assure the concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*,

369 U.S. 186, 204 (1962); *see also Mass. v. EPA*, 127 S.Ct. 1438, 1453 (2007).

Some lower courts, applying this Court's traditional standing principles, have properly held that litigants have standing to challenge government surveillance programs if they can demonstrate an injury that is traceable to the surveillance and that would be redressed by a favorable decision. *See, e.g., Presbyterian Church v. United States*, 870 F.2d 518, 522 (9th Cir. 1989) (recognizing "distinct and palpable" injury to church where surveillance prevented "*individual congregants* from attending worship services, and . . interfered with the churches' ability to carry out their ministries" (emphasis in the original)); *Ozonoff v. Berzak*, 744 F.2d 224, 229-230 (1st Cir. 1984) (finding standing where plaintiff refused to apply for position at the World Health Organization for fear that his political activities and speech might be subject to surveillance by the FBI).

The D.C. Circuit, however, like the Sixth Circuit, has imposed a unique burden on litigants who seek to challenge government surveillance programs, requiring them to go beyond traditional standing requirements and demonstrate that they themselves were monitored under the program they seek to challenge. *United Presbyterian Church v. Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984) (stating that "fear of being subjected to illegal surveillance . . . which deters [plaintiffs] from conducting constitutionally protected activities[ ] is foreclosed as a basis for standing by the Supreme Court's holding in *Laird* [ ]"); *Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982) (holding that "appellants' inability to

adduce proof of actual acquisition of their communications now prevents them from stating a claim cognizable in the federal courts"); *Halkin v. Helms*, 598 F.2d 1, 6 (D.C. Cir. 1978) (dismissing challenge to government wiretapping after finding that "the acquisition of the plaintiffs' communications [was] a fact vital to their claim" and that plaintiffs could not establish acquisition without access to evidence protected by the state secrets privilege).[10]

The confusion in the lower courts stems in part from divergent readings of this Court's decision in *Laird*. In *Laird*, the plaintiffs sought to enjoin the Department of the Army from gathering and distributing information about lawful and peaceful civilian activity. The plaintiffs conceded that there was no evidence that the surveillance at issue was conducted pursuant to unlawful means; in fact, the record demonstrated that "the information gathered [was] nothing more than a good newspaper reporter would [have been] able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand." *Id.* at 9. The plaintiffs also admitted that they had not been at all "cowed and chilled" by the threat of Army surveillance. *Id.* at 14 n.7. This Court held that plaintiffs lacked standing to challenge the Army's actions. While the Court noted that governmental

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[10] *See also Sinclair v. Schriber*, 916 F.2d 1109, 1115 (6th Cir. 1990) (dismissing First Amendment claim even where plaintiff could show that government intercepted his communications because plaintiff could not point to concrete injury beyond the surveillance itself).

action "may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights," it held that the plaintiffs had failed to demonstrate that they had suffered *any* present or future harm as a result of the challenged surveillance program. *Id* at 12-13. The Court also noted that its previous "chilling effect" cases had involved government power that was "regulatory, proscriptive, or compulsory in nature." *Id.* at 11. The Court held that plaintiffs could not establish standing by pointing to the "mere existence, *without more*, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary." *Id.* at 10 (emphasis added).

Laird turned on the plaintiffs' failure to demonstrate injury and plainly did not set out a new (and virtually prohibitive) standing rule for challenges to government surveillance. Indeed, in *Laird* the Court expressly cautioned that its decision should not be understood to foreclose suits by those who could demonstrate actual or threatened injury:

> [W]hen presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful

> activities of the military would go unnoticed or unremedied.

Id. at 15-16. Moreover, two years after *Laird*, Justice Marshall (writing as Circuit Justice) expressly rejected the reading of *Laird* that the D.C. and Sixth Circuits have since adopted:

> In this case . . . the applicants have complained that the challenged investigative activity will have the concrete effects of dissuading [Youth Socialist Alliance] delegates from participating actively in the [national convention] and leading to possible loss of employment for those who are identified as being in attendance. Whether the claimed "chill" is substantial or not is still subject to question, but that is a matter to be reached on the merits, not as a threshold jurisdictional question. The specificity of the injury claimed by the applicants is sufficient, under *Laird*, to satisfy the requirements of Art. III.

Socialist Workers Party v. Attorney Gen. of the United States, 419 U.S. 1314, 1319 (1974).

This case presents an opportunity for the Court to clarify the circumstances in which litigants who have been injured by government surveillance have standing to challenge the lawfulness of that surveillance. The three opinions from the Sixth Circuit panel offer three different understandings of this Court's standing jurisprudence. Judge Gilman found that plaintiffs had satisfied the injury

requirement because they had "identified concrete harms to themselves flowing from their reasonable fear that the [Program] will intercept privileged communications between themselves and their clients." App. 180a (Gilman, J., dissenting). He observed that this Court and others have repeatedly recognized that the kinds of injuries asserted here are sufficient to support standing. App. 187a-189a (citing *Meese v. Keene*, 481 U.S. 465 (1980); *Ozonoff*, 744 F.2d 244). Judges Batchelder and Gibbons, on the other hand, found that plaintiffs did not have standing to challenge the Program because they could not demonstrate that they themselves had been monitored under it. App. 93a-109a (Batchelder, J., addressing plaintiffs' First Amendment claim); App. 123a-126a (addressing plaintiffs' Fourth Amendment claim); App. 126a-132a (addressing plaintiffs' separation of powers claim); App. 159a (Gibbons, J.) ("[t]he disposition of all of the plaintiffs' claims depends upon the single fact that the plaintiffs have failed to provide evidence that they are personally subject to the [Program]"). Judge Batchelder also found that plaintiffs would not have standing to bring their First Amendment claim even if they *could* show that they had been monitored under the Program because the challenged surveillance was not "regulatory, prescriptive, or compulsory in nature." App. 189a-190a; *see also* App. 168a (Gibbons, J., concurring) ("The implication of [Judge Batchelder's] reasoning is that even if the plaintiffs had evidence that they were personally subject to the [Program], they would not have standing if the government was only conducting surveillance.").

Judge Gilman's dissenting opinion read *Laird* correctly. As Judge Gilman noted, the plaintiffs in *Laird* had suffered no injury at all: rather they asserted a "generalized fear" stemming from the "mere existence" of the challenged government program. App. 180a, 188a. To deny standing to those who have suffered concrete injury from a challenged government surveillance program because they cannot establish with certainty that they have been monitored under the program (a fact that the government refuses to disclose) would erect a barrier that does not exist in analogous contexts. *See, e.g., Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738 (2007); *Laidlaw*, 528 U.S. at 184 (finding that plaintiffs had standing to challenge defendant's pollution of lake because there was "nothing improbable about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms" (internal quotation marks omitted)); *Bennett v. Spear*, 520 U.S. 154, 168 (1997) (finding injury where plaintiffs alleged reduction in aggregate water supply because "given . . . that the amount of available water will be reduced . . . it is easy to presume specific facts under which petitioners will be injured"); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989) (allowing facial challenge to mandatory and discretionary employee drug testing policies where plaintiffs had demonstrated risk that they would be subject to the policies). The barrier would be insuperable where the government invoked the state secrets privilege, as it has here, and would effectively

invest the executive branch with the ability to insulate far-reaching and intrusive surveillance programs from judicial review.[17]

Petitioners have suffered concrete injury because of the Program and they continue to suffer injury to the extent that executive branch officials are conducting surveillance under the PAA without meaningful judicial review. Plaintiffs who have suffered concrete injury because of a government surveillance program should not be barred from the courthouse simply because the government refuses to disclose whether plaintiffs themselves were targeted under the program. This is true whether the surveillance is conducted according to statute or in violation of it. This Court should grant review to make this clear.

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[17] There is no assurance that the lawfulness of the Program will be tested in the context of criminal proceedings. The government may decide not to initiate criminal proceedings in any case where the lawfulness of the Program may become an issue. Even if the government chooses to use evidence obtained under the Program in a criminal prosecution, the defendant may never learn the source of the government's evidence. Notably, numerous criminal defendants have asked the government to disclose whether it monitored their communications under the Program. The government has refused to do so. *See, e.g., United States v. Aref*, No. 04-cr-00402 (N.D.N.Y. filed Aug. 6, 2004), *appeal docketed*, No. 07-0981 (2d Cir. Mar. 27, 2007).

III. The Court Should Grant Review to Make Clear That the President Lacks Authority to Engage in Intelligence Surveillance that Congress Has Expressly Prohibited.

From the fall of 2001 until January 2007, the President operated a far-reaching and intrusive program of warrantless electronic surveillance within the nation's borders. The two judges that reached the question correctly found that the Program operated in violation of statutory law. In defense of the Program, the President has claimed the authority to violate *any* statute if he concludes that it interferes with his power under Article II to protect the nation during a time of war. This dangerous claim – essentially a claim that the President is above the law – should not go unreviewed by this Court.

The question whether the President possesses authority under Article II to violate FISA remains a live one. Soon after the President acknowledged the existence of the Program in December 2005, the Justice Department issued a white paper stating that, if FISA and Title III were interpreted to prohibit the Program, "the constitutionality of FISA, as applied to that situation, would be called into very serious doubt," and that "if this difficult constitutional question had to be addressed, FISA would be unconstitutional as applied to this narrow context." U.S. Dep't of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, at 3, Jan. 19,

2006.[15] The President advanced similar claims before the district court and the Sixth Circuit. *See ACLU v. NSA*, No. 06-10204, Dkt. No. 34, pp. 30, 38 (E.D. Mich., May 26, 2006) (Memorandum of Points and Authorities in Support of the United States' Assertion of the Military and State Secrets Privilege); *ACLU v. NSA*, Nos. 06-2095, 06-2140, Dkt. No. 1, pp.45-47 (6th Cir., Oct. 13, 2006) (Brief for Appellants). The President suspended the Program in January 2007 but continued to assert the authority to violate statutory law. *See, ACLU v. NSA* Nos. 06-2095, 06-2140, Dkt. No. 89, p.7 n.4 (6th Cir., Jan. 24, 2007) (Government's Supplemental Submission Discussing the Implications of the Intervening FISA Court Orders of January 10, 2007); *Hearing Before the S. Intelligence Committee on the Foreign Intelligence Surveillance Modernization Act of 2007*, 110th Cong. (2007) (in which Assistant Attorney General for National Security Ken Wainstein emphasized that "Article II authority exists independent of [any proposed FISA] legislation and independent of the FISA statute"). The President asserted the same authority even after Congress enacted the PAA. James Risen & Eric Lichtblau, *Concerns Raised on Wider Spying Under New Law*, N.Y. Times, Aug. 19, 2007 (describing an August 2007 meeting at which Justice Department officials "refused to commit the administration to adhering to the limits laid out in the new legislation and left open the possibility that the president could

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[15] The white paper is available at http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/nsa/nsadoj1906wp.pdf

CERTIFICATE OF COMPLIANCE

AMERICAN CIVIL LIBERTIES UNION, ET AL.,
Petitioner,

v.

NATIONAL SECURITY AGENCY, ET AL.,
Respondent

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 7,630 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 2, 2007

JAMEEL JAFFER

once again use what they have said in other instances in his constitutional authority to act outside the regulations set by Congress"). Thus, the issue presented here is pressing. Furthermore, it raises a pure question of law that goes to the heart of our constitutional democracy. *United States v. Nixon*, 418 U.S. 683, 715 (1974).

This Court should grant review to make clear that the President does not possess authority to engage in surveillance that Congress has expressly prohibited. The legislative power is vested in Congress. U.S. Const., Art. I, § 1, and it is the President's role to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3. Where Congress has enacted a law within the scope of its constitutionally provided authority, the President lacks authority to disregard it. If the President could disregard duly enacted statutes, "it would render the execution of the laws dependent on his will and pleasure." *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.N.Y. 1806). As Justice Kennedy recently cautioned, "[c]oncentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid." *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2800 (2006) (Kennedy, J., concurring).

The President does not have authority under Article II to disregard a law that Congress has enacted in the proper exercise of its own constitutional powers. *Youngstown*, 343 U.S. at 587 (Jackson, J., concurring) ("The Constitution limits [the President's] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad"). Applying that

principle in *Hamdan v. Rumsfeld*, in which this Court found that military commissions set up by the President to try prisoners held at Guantanamo did not comply with the Uniform Code of Military Justice, a statute enacted by Congress in exercise of its constitutional war powers. *See Hamdan*, 126 S. Ct. at 2774 n.23 (stating that, in a field of shared authority, the President "may not disregard limitations that Congress has, in proper exercise of its own . . . powers, placed on his powers"). Likewise, in this context, the President is bound by the laws that Congress enacts. He may disagree with those laws, but he may not disobey them.

No derogation from this fundamental principle of checks and balances has ever been permitted, even in times of national security crisis. In *Youngstown*, the President argued that his actions were "necessary to avert a national catastrophe." *Youngstown*, 343 U.S. at 582. In *Hamdan*, the President argued that his actions were a measured response to "the danger to the safety of the United States and the nature of international terrorism." 126 S. Ct. at 2791. The Supreme Court nonetheless held in both cases that the President could not disregard duly enacted statutory law. The government has suggested, as it did in *Youngstown* and *Hamdan*, that the President's actions are a "vital" response to a pressing emergency. *ACLU v. NSA*, Nos. 06-2095, 06-2140, Dkt. No. 1, p.46 (6th Cir., Oct. 13, 2006) (Brief for Appellants). But as this Court has observed in another context, "[e]mergency does not create power." *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425-26 (1934). "The Constitution was adopted in a period of grave

emergency. Its grants of power to the federal government . . . were determined in the light of emergency, and they are not altered by emergency." *Id.*; *see also Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866) ("The Constitution of the United States is a law for rules and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."); *Hamdi*, 542 U.S. at 536 (plurality opinion) (stating that even "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens").

This Court should not leave unreviewed a decision that licenses the President to conduct surveillance that directly violates statutory law. The President has said that he has suspended the Program, but the claim he has made – that he has authority to violate the law – may be implemented at any time, if not by this administration then by a subsequent one. This Court should not allow this claim to go unanswered.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted.

JAMEEL JAFFER
Counsel of Record
MELISSA GOODMAN
STEVEN R. SHAPIRO
American Civil
Liberties Union Fdn.
125 Broad Street
New York, NY 10004
(212) 549-2500

MICHAEL J. STEINBERG
KARY L. MOSS
American Civil
Liberties Union
Fund of Michigan
60 West Hancock Street
Detroit, MI 48201-1343
(313) 578-6814

RANDAL L. GAINER
KRISTINA SILJA BENNARD
Davis Wright
Tremaine LLP
1201 Third Avenue
Seattle, WA 98101-3045
(206) 628-7660

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No. 07-468

In the Supreme Court of the United States

AMERICAN CIVIL LIBERTIES UNION, ET AL.,
PETITIONERS

v.

NATIONAL SECURITY AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
DOUGLAS N. LETTER
THOMAS M. BONDY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioners have standing to seek prospective equitable relief against a foreign intelligence-gathering program that no longer exists, without any evidence that they were ever surveilled under that program.

2. Whether petitioners' prospective challenge to the program is justiciable despite the fact that the program no longer exists.

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In the Supreme Court of the United States

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PETITIONERS

v.

NATIONAL SECURITY AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 66a-235a) is reported at 493 F.3d 644. The decision of the district court (Pet. App. 1a-65a) is reported at 438 F. Supp. 2d 754.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2007 (Pet. App. 66a). The petition for a writ of certiorari was filed on October 3, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 11, 2001, al Qaeda agents who had entered the United States launched coordinated attacks on key strategic sites, killing approximately 3,000 peo-

ple. The President immediately declared a national emergency in view of "the continuing and immediate threat of further attacks on the United States." 66 Fed. Reg. 48,199 (2001). The United States also launched a military campaign against al Qaeda, and Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" of September 11. See Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224. Since that time, top al Qaeda leaders, including Osama bin Laden, have repeatedly vowed to strike America and her allies again. See, *e.g.*, *President's News Conference*, 41 Weekly Comp. Pres. Doc. 1885, 1886 (Dec. 19, 2005) (*News Conference*).

Against this backdrop, and in light of unauthorized media disclosures, the President acknowledged in December 2005 that he had authorized what he termed a Terrorist Surveillance Program (TSP) by directing the National Security Agency (NSA) to intercept international communications into and out of the United States of persons linked to al Qaeda. *News Conference* 1885. The government publicly stated that communications would be intercepted under this program only if there were reasonable grounds to believe that one party to the international communication was a member or agent of al Qaeda or an affiliated terrorist organization. See *id.* at 1889. The government has never revealed the methods and means of the TSP—including the identities of persons surveilled under that program—because of the grave harm to national security that would result from such disclosure.

In January 2007, the Attorney General publicly advised the Senate Judiciary Committee that, "on January

10, 2007, a Judge of the Foreign Intelligence Surveillance Court [FISC] issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization. As a result of these orders, any electronic surveillance that was occurring as part of the Terrorist Surveillance Program will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court." Letter from the Attorney General to the Chairman and Ranking Member of the Senate Judiciary Committee (Jan. 17, 2007). The Attorney General explained that, while "the Terrorist Surveillance Program fully complie[d] with the law," the "complex" and "innovative" FISC orders "allow[ed] the necessary speed and agility while providing substantial advantages" for conducting foreign intelligence activities. *Ibid.* "[U]nder these circumstances, the President * * * determined not to reauthorize the Terrorist Surveillance Program." *Ibid.* As a result, the program acknowledged by the President no longer exists.

2. In January 2006, while the TSP was in effect, petitioners filed this suit, which seeks only prospective equitable relief. C.A. App. 75-76. Petitioners alleged that they conducted international telephone calls for journalistic, legal, and scholarly purposes, that the TSP would likely have intercepted some of their calls, and that such interception was unlawful. *Id.* at 18. In response, the United States formally asserted the state secrets privilege through the then-Director of National Intelligence, John Negroponte, and the NSA's Signals Intelligence Director, Major General Richard Quirk. Director Negroponte and General Quirk explained in public declara-

tions that "to discuss the TSP in any greater detail [than has been made public] * * * would disclose classified intelligence information and reveal intelligence sources and methods, which would enable adversaries of the United States to avoid detection by the U.S. Intelligence Community and/or take measures to defeat or neutralize U.S. intelligence collection, posing a serious threat of damage to the United States' national security interests." *Id.* at 164; see *id.* at 170. The government also provided the district court with *ex parte, in camera* classified declarations of both Director Negroponte and General Quirk elaborating on the details of the TSP and the government's assertion of the state secrets privilege.

3. The district court permanently enjoined further use of the TSP. Pet. App. 1a-65a. The court first determined that the government had "appropriately invoked" the state secrets privilege. *Id.* at 16a. "After reviewing [the classified] materials," the court explained that it was "convinced that the privilege applies 'because a reasonable danger exists that disclosing the information in court proceedings would harm national security interests, or would impair national defense capabilities, disclose intelligence-gathering methods or capabilities, or disrupt diplomatic relations with foreign governments.'" *Id.* at 17a (quoting *Tennenbaum* v. *Simoni*, 372 F.3d 776, 777 (6th Cir.), cert denied, 543 U.S. 1000 (2004)). The court nevertheless declined to dismiss the case, concluding that petitioners' challenge could proceed on the theory that their "claims regarding the TSP are based solely on what Defendants have publicly admitted." *Id.* at 18a.

The district court held that petitioners had established standing to challenge the TSP because they "are not merely alleging that they 'could conceivably' become

subject to surveillance under the TSP, but that continuation of the TSP has damaged them." Pet. App. 27a. On the merits, the court held that "searches conducted without prior approval by a judge or magistrate [are] per se unreasonable" under the Fourth Amendment, and that the TSP violated the First and Fourth Amendments for that reason. *Id.* at 34a, 47a. The court went on to state that the TSP violated the constitutional separation of powers because it was inconsistent with the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. 1801 *et seq.*, which generally requires the government to obtain the approval of the FISC for "electronic surveillance." Pet. App. 51a-52a.[1]

4. The government appealed and obtained a stay of the district court's injunction. After the Attorney General publicly advised the Senate Judiciary Committee of the January 2007 FISC orders, see pp. 2-3, *supra*, the government filed a supplemental submission in the court of appeals urging that this case was moot. The government explained that the TSP no longer had any live significance because, "[a]s a result of the new orders, any electronic surveillance that was conducted as part of the TSP is now being conducted subject to the approval of the [FISC]." Decl. of Lieutenant General Keith B. Alexander, Director, NSA ¶ 3 (Jan. 24, 2007) (Alexander Decl.).

5. Without reaching the government's mootness argument, the court of appeals vacated the judgment of

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[1] The district court granted the government's summary judgment motion with respect to petitioners' "datamining" claim, which challenged a different alleged surveillance activity. See Pet. App. 20a-21a. The court of appeals affirmed the dismissal of that claim, *id.* at 158a, and petitioners do not challenge that determination in this Court, Pet. 4 n.9, 7 n.11.

the district court and remanded with instructions to dismiss for lack of standing. See Pet. App. 67a, 74a-75a n.4.

a. In the lead opinion, Judge Batchelder emphasized that petitioners "have not challenged on appeal either the invocation or the grant of the state secrets privilege." Pet. App. 72a n.3. With respect to standing, Judge Batchelder explained that petitioners "do not—and because of the State Secrets Doctrine cannot—produce any evidence that any of their own communications have ever been intercepted by the NSA, under the TSP, or without warrants." *Id.* at 78a. Moreover, petitioners "do *not* allege as injury that they personally, either as individuals or associations, anticipate or fear any form of direct reprisal by the government * * * such as criminal prosecution, deportation, administrative inquiry, civil litigation, or even public exposure." *Id.* at 79a. Instead, Judge Batchelder explained, petitioners alleged "only a subjective apprehension and a personal (self-imposed) unwillingness to communicate" out of fear that some of their communications might be intercepted under the TSP. *Id.* at 100a.

Judge Batchelder held that petitioners' attempt to establish standing based on a subjective chilling effect fails under this Court's decision in *Laird* v. *Tatum*, 408 U.S. 1 (1972), which she construed to hold that "a plaintiff must establish that he or she is regulated, constrained, or compelled directly by the government's actions, instead of by his or her own subjective chill." Pet. App. 96a. Judge Batchelder further rejected petitioners' contention that they possess standing because their reluctance to communicate electronically has caused them professional harm. *Ibid.* She explained that such an exception to *Laird* "would effectively value commer-

cial speech above political speech," even though the latter is entitled to greater protection. *Ibid.*

In addition, Judge Batchelder determined that, even if petitioners had suffered a cognizable injury, any such injury was not caused by the TSP and would not be redressable by a favorable decision in this case. Pet. App. 112a-116a, 119a-123a. Because petitioners assert that their overseas contacts are "the types of people likely to be monitored by the NSA," their communications might be monitored under FISA or some other source of law even apart from the TSP. *Id.* at 114a-115a. Thus, Judge Batchelder concluded, petitioners would face the same chilling effect even if the TSP were enjoined. *Ibid.*

b. Judge Gibbons concurred in the judgment. Pet. App. 159a-170a. She determined that "[t]he disposition of all of the plaintiffs' claims depends upon the single fact that the plaintiffs have failed to provide evidence that they are personally subject to the TSP." *Id.* at 159a. In her view, "a plaintiff must be actually subject to the defendant's conduct, not simply afraid of being subject to it." *Id.* at 164a.

c. Judge Gilman dissented. Pet. App. 171a-233a. He believed that the attorney-plaintiffs have standing because, "as part of their representation of clients accused of being enemy combatants or of providing aid to organizations designated as terrorist groups * * * these attorneys have communicated with potential witnesses, experts, lawyers, and other individuals who live and work outside the United States about subjects such as terrorism, jihad, and al-Qaeda." *Id.* at 177a-178a. On the merits, Judge Gilman "conclude[d] that the TSP violates FISA and Title III [of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82

Stat. 212 (18 U.S.C. 2510 *et seq.*)] and that the President does not have the inherent authority to act in disregard of those statutes." *Id.* at 217a; see *id.* at 217a-233a.

6. On August 5, 2007, after the court of appeals' ruling, Congress enacted the Protect America Act (PAA), Pub. L. No. 110-55, 121 Stat. 552. Among other things, the PAA provides that "[n]othing in the definition of electronic surveillance under [FISA] shall be construed to encompass surveillance directed at a person reasonably believed to be located outside the United States." § 2, 121 Stat. 552. The PAA provides for procedures governing the acquisition of foreign intelligence information concerning persons reasonably believed to be outside the United States, review of those procedures by the FISC, and mandatory reporting to Congress by the Attorney General. §§ 2-4, 121 Stat. 552-556. The PAA specifies that, except as otherwise provided, "the amendments made by this Act shall take effect immediately after the date of the enactment of this Act," and "shall cease to have effect 180 days after the date of the enactment of this Act." § 6, 121 Stat. 556-557.

ARGUMENT

Petitioners argue (Pet. 19-32) that they have standing to seek prospective equitable relief against the TSP—a program that no longer exists—on the ground that it was unlawful. Petitioners do not, however, challenge the district court's determination that the state secrets privilege bars them from proving that they were surveilled under that program. The court of appeals' holding that petitioners cannot establish standing without such evidence is correct and does not conflict with any decision of this Court or any other court of appeals. Indeed, petitioners candidly and correctly conceded be-

low that their standing theory is "unprecedented." Pet. App. 82a n.11, 88a n.17. Petitioners' challenge to the legality of the TSP is not properly presented in this case, not only because petitioners lack standing, but also because the court below did not reach that question. Moreover, the government's discontinuance of the TSP in January 2007, and Congress's subsequent enactment of the PAA, deprived this action—which seeks only prospective equitable relief against the TSP—of any continuing, live significance. Further review is unwarranted.

1. a. Petitioners do not challenge the district court's holding that the government properly invoked the state secrets privilege and that the privilege protects against disclosure of whether petitioners were surveilled under the TSP. After reviewing the classified materials that the government had submitted for *ex parte*, *in camera* review, the district court correctly found that the government had properly invoked the state secrets privilege, and that "the information for which the privilege is claimed qualifies as a state secret," because "a reasonable danger exists that disclosing the information in court proceedings would harm national security interests." Pet. App. 17a (citations omitted).

The information protected by the state secrets privilege includes "whether [petitioners] have been subject to surveillance by the NSA," as well as other facts concerning "intelligence activities, sources, methods, or targets" of the TSP. C.A. App. 164; see *id.* at 170. As the government's public declarations explained:

> [D]isclosure of those who are targeted by [intelligence] activities would compromise the collection of intelligence information just as disclosure of those who are not targeted would reveal to adversaries that certain communications channels are secure or,

> more broadly, would tend to reveal the methods being used to conduct surveillance. The only recourse for the Intelligence Community and, in this case, for the NSA, is to neither confirm nor deny these sorts of allegations, regardless of whether they are true or false. To say otherwise when challenged in litigation would result in routine exposure of intelligence information, sources, and methods and would severely undermine surveillance activities in general.

Id. at 164-165; see *id.* at 170; cf. *Al-Haramain Islamic Found., Inc.* v. *Bush*, No. 06-36083, 2007 WL 3407182, at *12 (9th Cir. Nov. 16, 2007) (holding that "information as to whether the government surveilled [the plaintiff]" under the TSP was a state secret, and that "the basis for the privilege [was] exceptionally well documented" in the government's *in camera, ex parte* affidavits).

Petitioners did "not challenge[] on appeal either the invocation or the grant of the state secrets privilege," and the court of appeals did not pass upon those questions. Pet. App. 72a n.3; accord *id.* at 168a (Gibbons, J., concurring in the judgment). Thus, the question is not properly before this Court, see, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992), and the case therefore comes to this Court on the premise that petitioners cannot prove that they were surveilled under the TSP. See Pet. App. 83a ("[P]laintiffs concede that there is no single plaintiff who can show that he or she has actually been wiretapped.").

b. That fact is fatal to petitioners' attempt to prove standing. The Constitution "requires the party who invokes the court's authority to show that he *personally* has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge Christian Coll.* v. *Americans United for Sepa-*

ration of Church & State, Inc., 454 U.S. 464, 472 (1982) (citation omitted; emphasis added). Thus, "persons who [a]re not parties to unlawfully overheard conversations * * * d[o] not have standing to contest the legality of the surveillance" on Fourth Amendment grounds. *Rakas* v. *Illinois*, 439 U.S. 128, 136 (1978). There is no reason to reach a different conclusion about petitioners' other claims.

In analogous circumstances, courts have consistently held that a plaintiff lacks standing to challenge a government surveillance program where, as here, the state secrets privilege prevents the plaintiff from establishing, and the government from refuting, that he was surveilled. For example, in *Halkin* v. *Helms*, 690 F.2d 977 (D.C. Cir. 1982), plaintiffs argued that their names were included on "watchlists" used to govern NSA surveillance, and that there was therefore a "substantial threat" that their communications would be intercepted. See *id.* at 983-984, 997. The District of Columbia Circuit nevertheless affirmed the dismissal of the plaintiffs' Fourth Amendment claim, "hold[ing] that [plaintiffs'] inability to adduce proof of actual acquisition of their communications" rendered them "incapable of making the showing necessary to establish their standing to seek relief." *Id.* at 998; accord *Ellsberg* v. *Mitchell*, 709 F.2d 51, 65 (D.C. Cir. 1983) (holding that the case had to be dismissed because plaintiff could not, absent recourse to state secrets, establish that he was surveilled).

Most recently, the Ninth Circuit unanimously held in *Al-Haramain* that a plaintiff lacked standing to challenge the TSP. 2007 WL 3407182, at *14. The Ninth Circuit explained that "information as to whether the government surveilled [the plaintiff]" under the TSP was a state secret, *id.* at *12, and that, without such in-

formation, the plaintiff "cannot establish that it has standing," *id.* at *14. In *Al-Haramain*, the plaintiff alleged that it had seen a classified document indicating that it had been subject to surveillance under the TSP. See *id.* at *1. Petitioners here offer nothing to establish standing other than claims of subjective "chill" on their speech or activities.[2]

The holdings of those cases are reinforced by FISA—the statute on which petitioners principally rely. FISA authorizes only an "aggrieved person" to bring a civil action challenging the acquisition of communications contents. 50 U.S.C. 1801(f) (2000 & Supp. IV 2004); 50 U.S.C. 1810. To ensure that the term "aggrieved person" is "coextensive [with], but no broader than, those persons who have standing to raise claims under the Fourth Amendment with respect to electronic surveillance" (H.R. Rep. No. 1283, 95th Cong., 2d Sess. 66 (1978)), Congress defined the term "aggrieved person" to mean one "whose communications or activities were *subject to* electronic surveillance" or who was *targeted by* such surveillance. 50 U.S.C. 1801(k) (emphasis added). Litigants who cannot establish their status as "aggrieved person[s]" do "not have standing" under "any" of FISA's provisions. H.R. Rep. No. 1283, *supra*, at 89-90. Because petitioners cannot prove that they

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[2] The *Al-Haramain* court remanded for the district court to determine, in the first instance, whether FISA preempts the state secrets privilege. 2007 WL 3407182, at *14. That question is not presented here because petitioners have not challenged the applicability of the state secrets privilege and, in any event, have never claimed, in the lower courts or in their petition for a writ of certiorari, that FISA displaces that privilege. Moreover, no court has ever held that FISA has that effect.

were surveilled, the court of appeals correctly held that their suit must be dismissed for lack of standing.

c. Petitioners nonetheless contend (Pet. 4-6) that they have standing because they chose not to communicate electronically with third parties, and third parties declined to communicate electronically with them, out of fear that their communications would be intercepted under the TSP. As Judge Batchelder explained, a person's own decision to cease expressive activity does not establish standing. Pet. App. 96a; see *Laird* v. *Tatum*, 408 U.S. 1, 11 (1972); *United Presbyterian Church* v. *Reagan*, 738 F.2d 1375, 1380 (D.C. Cir. 1984) (Scalia, J.).

That conclusion follows directly from *Laird*. In *Laird*, "most if not all of the [plaintiffs]" established that they had "been the subject of Army surveillance reports." *Tatum* v. *Laird*, 444 F.2d 947, 954 n.17 (D.C. Cir. 1971), rev'd on other grounds, 408 U.S. 1 (1972). They argued that the surveillance of their activities had "chill[ed]" their exercise of First Amendment rights. *Laird*, 408 U.S. at 13. This Court nevertheless held that the plaintiffs failed to demonstrate "a direct injury as the result of [the government's] action," because their decision to curtail their expressive activity reflected a "subjective 'chill'" that did not qualify as a "specific present objective harm or a threat of specific future harm." *Id.* at 13-14 (citation omitted).

The Court in *Laird* explained that "none" of its decisions in which government action violated the First Amendment because of its "'chilling' effect" on expressive activity found standing based on a plaintiff's knowledge of government activity and his "fear that, armed with the fruits of those activities, the [government] might" take other injurious action. 408 U.S. at 11. Rather, those cases involved harms directly caused by

"the challenged exercise of governmental power" because the "complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging." *Ibid.*

Petitioners argue (Pet. 23) that *Laird* merely held that a plaintiff must prove some injury to establish standing. But the injuries alleged by petitioners all result from an alleged chilling effect on their communications, and that is precisely what *Laird* held insufficient to confer standing. Indeed, petitioners' asserted injury is even weaker than the one rejected in *Laird*. As Judge Batchelder explained, petitioners rely in large part on alleged injuries caused by alleged decisions of third parties—their foreign contacts—to cease communicating with them. See Pet. App. 116a-117a. A chilling effect on third parties is an even less appropriate basis for standing than a chilling effect on petitioners themselves. See *ibid.* Because "a federal court [may] act only to redress injury that fairly can be traced to the challenged action of the defendant," *Simon* v. *East Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976), standing is ordinarily "substantially more difficult" to establish where the claimed injury is the result of the independent actions of third parties. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (citation omitted).

That does not mean, as petitioners suggest (Pet. 14), that no plaintiff will ever have standing to challenge any government surveillance program. The district court's unchallenged state secrets determination precludes petitioners from attempting to prove their standing to challenge the TSP. But the state-secrets privilege is not lightly invoked, and the government's assertion of the privilege is subject to judicial review, as it was by the district court (which concluded that it was properly in-

voked by the government here). See Pet. App. 16a-17a; *United States* v. *Reynolds*, 345 U.S. 1, 8 (1953). Moreover, if the government sought to use the results of any surveillance against a person, that person might be able to prove standing based on the government's disclosure of the surveillance and any injury caused by the attempted use. In any event, it is well settled that "[t]he assumption that if [petitioners] have no standing to sue, no one would have standing, is not a reason to find standing." Pet. App. 130a (quoting *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974)).[3]

d. Even if petitioners had established a relevant injury, they would still lack standing because they could not prove that the TSP caused their asserted injury or that the injury would be redressed by an injunction against the TSP. Cf. *Defenders of Wildlife*, 504 U.S. at 560-562. Under petitioners' own theory, the people they would like to telephone are suspected terrorists who might be subject to FISA-authorized surveillance or surveillance by their own (foreign) governments. See Pet. App. 114a. Thus, even if a chilling effect could give rise to a cognizable injury for standing purposes, it is at best speculative to assert that any chilling effect was caused by *the TSP*, as opposed to other sources, or that any injury from a chilling effect would be redressed by enjoining the TSP. As Judge Batchelder explained, peti-

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[3] Nor are petitioners (Pet. 15, 19, 26) correct that, under the court of appeals' decision, a plaintiff must prove surveillance "with certainty." Proof by a preponderance of the evidence would suffice. Here, however, petitioners' contention that they have been surveilled is "purely speculative." Pet. App. 163a (Gibbons, J., concurring in the judgment). As Judge Batchelder explained, "[t]he evidence establishes only a *possibility* not a *probability* or certainty that these communications might be intercepted." *Id.* at 128a (second emphasis added).

tioners "have neither asserted nor proven any basis upon which to justifiably conclude that the mere absence of a warrant [under the TSP] * * * is the cause of [petitioners'] (and their overseas contacts') reluctance to communicate by telephone or email." *Id.* at 113a. That was true when the TSP existed, and it is especially true now that the TSP *no longer exists*.

e. There is no circuit split on the question presented here, and petitioners' contrary contention (Pet. 21) is undercut by their concession below that, at least for their Fourth Amendment claim, "it would be unprecedented for a court to find standing" without proof that the plaintiff's communications were intercepted. Pet. App. 82a n.11, 88a n.17. Petitioners assert (Pet. 21) that courts disagree on whether injury, traceability, and redressability suffice to establish standing to challenge a surveillance program. But no court disagrees that those are the requirements for Article III standing; instead, the question in each case is whether, on the facts of the case, those requirements are satisfied.

While petitioners allege (Pet. 21) that the decision below conflicts with *Ozonoff* v. *Berzak*, 744 F.2d 224 (1st Cir. 1984), and *Presbyterian Church* v. *United States*, 870 F.2d 518 (9th Cir. 1989), the court of appeals correctly distinguished both of those cases, along with the other cases on which petitioners relied below. Pet. App. 103a-104a, 106a-109a; see *id.* at 166a (Gibbons, J., concurring in the judgment).

In *Ozonoff*, the government required the plaintiff to submit to a "loyalty screening" program as a condition to seeking a job. 744 F.2d at 226, 229. Here, in contrast, petitioners have not proven that the government targeted them in any way; the government has not required petitioners to do anything (much less take a loyalty

test); and the government has not sought to impose any consequences for anything petitioners might have done. *Ozonoff* drew that very distinction by emphasizing that the plaintiff there, unlike the plaintiffs in *Laird*, "claim[ed] that the information gathering activities were directed against [him] specifically." *Id.* at 229. Moreover, there was no analogous redressability issue in *Ozonoff* because the loyalty-screening requirement was the clear cause of the plaintiff's injury. *Id.* at 230.

In *Presbyterian Church*, the plaintiff churches alleged that the government had surreptitiously recorded worship services and thereby deterred the churches' members from attending worship services. 870 F.2d at 521-522. The Ninth Circuit held that the churches had suffered an "organizational injury" based on the surveillance of their own services. *Id.* at 522. Here, in contrast, petitioners cannot prove that they (or any members of theirs) were surveilled. Moreover, the Ninth Circuit relied in part on a reputational injury to the churches, *id.* at 522-523—a type of injury that is not at issue here. Nor did *Presbyterian Church* present the same redressability issue that is presented here, because the plaintiffs there challenged the only relevant surveillance. Cf. *id.* at 523. The absence of a conflict with the Ninth Circuit's *Presbyterian Church* decision is further confirmed by that circuit's recent holding in *Al-Haramain*—a far more analogous case than *Presbyterian Church*—that "information as to whether the government surveilled [the plaintiff]" under the TSP was a state secret, 2007 WL 3407182, at *12, and that, with-

out such information, the plaintiff in that case could not "establish that it has standing," *id.* at *14.[4]

2. Petitioners (Pet. 28-32) also ask this Court to address a question that neither the court of appeals below nor any other appellate court has addressed: whether the TSP was lawful. The court of appeals did not reach that issue because of its holding that petitioners lack standing. And because "this is a court of final review and not first view," *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 110 (2001) (citation omitted), that question is not properly presented by this case.

Petitioners' challenge to the TSP also has been overtaken by intervening events—the TSP no longer exists. Indeed, the TSP is now two steps removed from current activities.

Petitioners filed this action in January 2006 seeking prospective relief against the TSP. See C.A. App. 18-19.

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[4] Petitioners' reliance (Pet. 26) on environmental cases is misplaced for similar reasons. See Pet. App. 154a-155a; *id.* at 161a-164a (Gibbons, J., concurring in the judgment). An environmental plaintiff can generally establish standing by showing that he uses an area affected by pollution and has reduced that use because he reasonably fears injury from the pollution. See, *e.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Env'tl Servs., Inc.*, 528 U.S. 167, 183-184 (2000). As Judge Batchelder explained, however, just as environmental plaintiffs cannot establish standing "without any evidence that the defendant has polluted their particular river," petitioners here cannot establish standing without "evidence that the government has intercepted their particular communications." Pet. App. 155a; see *id.* at 161a (Gibbons, J., concurring in the judgment) (emphasizing that, in *Laidlaw*, "the plaintiffs * * * were *in fact subject to defendant's conduct*"). Thus, for example, in *Laidlaw*, the plaintiff submitted detailed declarations from its members explaining that they had direct exposure to the waterborne pollution at issue in that case. See 528 U.S. at 181-183. Petitioners here, by contrast, cannot show that they have ever been subject to the activity about which they complain.

The suit was predicated on the notion that the TSP was unlawful because it authorized electronic surveillance "without court approval." *Id.* at 18, 29. In the wake of the January 2007 FISC orders, however, the President allowed the TSP to lapse, and any electronic surveillance that had been occurring as part of the TSP then began to be conducted subject to the approval of the FISC. See Alexander Decl. ¶¶ 3-4. While the court of appeals declined to reach the government's mootness argument because the court found that petitioners lack standing, Pet. App. 74a-75a n.4, the termination of the relevant program nearly a year ago renders the controversy moot and, *a fortiori*, counsels strongly against this Court's review of this case and certainly petitioners' merits arguments. There is no live controversy as to petitioners' prospective-only challenge to a program that no longer exists.

Moreover, after the court of appeals issued its ruling in this case, Congress changed the legal landscape yet again by enacting the Protect America Act in August 2007. Among other things, the PAA provides that FISA's limitations on "electronic surveillance" do not apply to "surveillance directed at a person reasonably believed to be located outside of the United States." § 2, 121 Stat. 552. On a prospective basis, therefore, the PAA defeats the essential premise underlying petitioners' case: that the surveillance that used to be conducted under the TSP—*i.e.*, surveillance in which one party to the communication is located outside of the United States—is statutorily subject to FISA's requirements for electronic surveillance.

Petitioners all but concede that their challenge to the TSP lacks prospective significance by arguing (Pet. 27) that they "continue to suffer injury to the extent that

executive branch officials are conducting surveillance *under the PAA* without meaningful judicial review" (emphasis added). Petitioners further state (Pet. 14) that the court of appeals' decision that they lack standing "forecloses [them] from amending their complaint to challenge the constitutionality of the [PAA]." Those contentions only underscore that petitioners no longer suffer any injury from the TSP, which is the only program petitioners have challenged in *this* case. If petitioners or others wish to file a suit challenging the PAA, they are free to do so.[5] But that is no reason to review petitioners' standing to challenge the now-defunct TSP, much less to consider the merits of their challenge to that program.

Pointing to the PAA's sunset clause, which generally provides that the amendments made by the PAA will cease to have effect in February 2008, see PAA § 6(c), 121 Stat. 557, petitioners observe (Pet. 13, 29-30, 32) that the PAA might not be extended or reenacted in its current form, and that the current or a subsequent President might decide at some future point to reinstate the TSP. But it seems much more likely that Congress would choose to extend the PAA or supplant it with more permanent legislation. In any event, such speculation serves only to underscore the absence of a live controversy concerning the discontinued TSP at this time. And even if the Executive were to implement a future program that was not subject to judicial supervision,

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[5] At least one such case is pending, along with dozens of other cases involving related issues that have been consolidated for pretrial purposes in a multi-district litigation proceeding in *In re NSA Telecommunications Records Litigation*, MDL No. 06-1791 (N.D. Cal.). Unlike this case, many of those cases involve claims for retrospective monetary relief.

there is no reason to believe that it would be materially indistinguishable from the TSP. At most, the potential lapse of the PAA means only that the TSP may be *three* steps removed from activities occurring at the time this Court could consider this case.

This Court has stressed that federal courts must avoid needlessly addressing serious constitutional issues, see, *e.g.*, *INS* v. *St. Cyr*, 533 U.S. 289, 299-300 (2001), and should proceed with special caution where the President's war powers are implicated, see *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 539 (2004) (plurality opinion). Those considerations are especially apt here, where litigating the merits of petitioners' claims would require delving into sensitive state secrets and possibly deciding delicate constitutional questions concerning the scope of the President's constitutional authority to conduct foreign intelligence surveillance in wartime.

3. In any event, petitioners' failure to take issue with the district court's state secrets ruling dooms their claims on the merits. In challenging the TSP, petitioners rely (Pet. 28) on FISA, which imposes various limitations on "electronic surveillance." 50 U.S.C. 1809(a). As Judge Batchelder determined, petitioners cannot prevail on their contention that the TSP violated FISA because, in light of the state secrets doctrine (which petitioners have not challenged), they cannot show that the TSP relied on "electronic surveillance" within the meaning of FISA. Pet. App. 145a-146a, 150a.

More fundamentally, any consideration of the merits of petitioners' challenges to the TSP would require consideration of materials protected by the state secrets privilege. Their Fourth Amendment challenge, for example, would require consideration of information encompassed by the state secrets privilege, including in-

formation concerning the need for the TSP to protect national security and the extent to which the TSP was tailored as an effective response. Thus, even if petitioners could establish standing, the state secrets privilege would preclude litigation of the merits of their claims. See *Halkin*, 690 F.2d at 1000 (holding that Fourth Amendment claim challenging warrantless surveillance is "impossible" to adjudicate where state secrets privilege encompasses facts relevant to reasonableness inquiry).

Above all, however, this petition provides no occasion for this Court to wade into such sensitive issues in light of the facts that petitioners have failed to establish standing and that the program they seek to enjoin on a prospective basis (only) no longer exists.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
DOUGLAS N. LETTER
THOMAS M. BONDY
Attorneys

DECEMBER 2007

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(3)

No. 07-468

IN THE

Supreme Court of the United States

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Petitioners,

—v—

NATIONAL SECURITY AGENCY, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONERS

MICHAEL J. STEINBERG
KARY L. MOSS
American Civil Liberties Union Fund of Michigan
60 West Hancock Street
Detroit, MI 48201-1343
(313) 578-6814

RANDAL L. GAINER
KRISTINA SILJA BENNARD
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
(206) 757-8047

JAMEEL JAFFER
Counsel of Record
MELISSA GOODMAN
STEVEN R. SHAPIRO
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioners confirm that none of the petitioners have parent companies nor do any publicly held companies own ten percent or more of their stock.

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INTRODUCTION

This suit challenges an unlawful NSA surveillance program that was in operation for more than five years and that the President has said he may resurrect at any time. The suit was filed by organizations and individuals that have indisputably been injured by the program (the "Program"). The government contends, however, that the case is moot because the President has indefinitely discontinued the Program, and that the plaintiffs lack standing to challenge the Program because they cannot prove – because the government refuses to confirm or deny the allegation – that they have been monitored under it.

Notwithstanding the government's arguments, the need for this Court's review is pressing and clear. The President has stated repeatedly that he retains the authority to resurrect the Program at any time; indeed, he has said that in some circumstances it would be his *duty* to do so. In this context, there is clearly no merit to the government's claim that the case is moot. Further, the government's brief only underscores the need for this Court's guidance on the issue of standing. The government does not dispute that plaintiffs have suffered injury as a result of the challenged program; its argument, put plainly, is that plaintiffs' injuries simply *do not count*.

This Court should intervene to make clear that innocent people who suffer concrete injuries because of government surveillance have standing to challenge that surveillance in court. Without this Court's intervention, plaintiffs' injuries will be irremediable and the President's expansive claim of

executive power will be altogether insulated from judicial review.

ARGUMENT

I. NEITHER THE GOVERNMENT'S VOLUNTARY CESSATION OF THE PROGRAM NOR THE ENACTMENT OF THE PROTECT AMERICA ACT RENDERS PETITIONERS' CLAIMS MOOT

The government asserts that its cessation of the Program renders this case moot. Government's Dec. 7, 2007 Brief for Respondents in Opposition ("BIO") at 18-21. What the government fails even to acknowledge, however, is that its decision to suspend its Program of congressionally prohibited and therefore unlawful warrantless surveillance, its decision to submit the Program to approval by the Foreign Intelligence Surveillance Court ("FISC") pursuant to a secret judicial order that is no longer in effect, and even its decision to abide by the terms of the Protect America Act (a law that temporarily permits expansive warrantless surveillance),[1] are entirely voluntary and non-binding. Although the government may be following the law (for now), it insists that the President has the right and in some contexts the duty to disregard statutory limits imposed on his authority to conduct foreign intelligence surveillance inside the United States. If this radical claim of executive power is left

[1] The Protect America Act was signed into law on August 5, 2007, and expires 180 days after its enactment. Pub. L. 110-55, § 6(c), 121 Stat. 552 (2007).

unreviewed, there is nothing to stop the government from resuming the Program tomorrow.

This Court has repeatedly held that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (citations omitted). If voluntary cessation of conduct rendered a case moot, "courts would be compelled to leave 'the defendant . . . free to return to his old ways.'" *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968) (quoting *W.T. Grant Co.*, 345 U.S. at 632). For this reason, a defendant's voluntary cessation of challenged activity moots a case only "if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 189 (2000) (quotation marks omitted).

There is no question that the government's cessation of the Program was wholly voluntary. Throughout this litigation, the government has asserted its constitutional authority to ignore FISA when it sees fit. *See* ACLU's Petition for Writ of Certiorari, *ACLU v. NSA*, No. 07-468 (Oct. 3, 2007) ("Pet.") at 28-29 (collecting statements to this effect). Even after the January 2007 FISC orders prompted the government to suspend the Program, the government rejected any suggestions that it was actually bound by the orders. It insisted it could ignore the FISC orders just as it could ignore statutory law. Pet. at 216a (Gilman, J., dissenting); *see also* James Risen, *Administration Pulls Back on Surveillance Agreement*, N.Y. Times, May 2, 2007,

(reporting that "Senior Bush administration officials told Congress on Tuesday that they could not pledge that the administration would continue to seek warrants from a secret court for a domestic wiretapping program, as it agreed to do in January"). In any event, the January 2007 FISC authorization no longer exists. According to Director of National Intelligence Mike McConnell, a May 2007 FISC ruling modified or vacated the January orders, leaving the government with "significantly less capability" to conduct foreign intelligence surveillance in the manner preferred by the government. *Transcript: Debate on the Foreign Intelligence Surveillance Act*, El Paso Times, Aug. 22, 2007.

The government's decision to conduct foreign intelligence surveillance in compliance with the Protect America Act or any superseding legislation is – in the President's view – wholly discretionary. Government officials have stated that the President retains the inherent authority to ignore statutory limits placed on the executive's foreign intelligence surveillance powers, whether those limits take the form of FISA as originally enacted, the Protect America Act, or FISA as it may be amended in the future. *See, e.g., Hearing Before the S. Intelligence Committee on the Foreign Intelligence Surveillance Modernization Act of 2007*, 110th Cong. (2007) (in which Assistant Attorney General for National Security Ken Wainstein emphasized that "Article II authority exists independent of [any proposed FISA] legislation and independent of the FISA statute"), *id.* (in which DNI Mike McConnell responded to the question whether the government has "any plans to do any surveillance independent of the FISA statute"

by stating: "None that we are formulating or thinking about currently. But I just highlight, Article II is Article II. So in a different circumstance, I can't speak for the President what he might decide."); James Risen, *Administration Pulls Back on Surveillance Agreement*, N.Y. Times, May 2, 2007; James Risen & Eric Lichtblau, *Concerns Raised on Wider Spying Under New Law*, N.Y. Times, Aug. 19, 2007 (describing an August 2007 meeting at which Justice Department officials "refused to commit the administration to adhering to the limits laid out in the new legislation and left open the possibility that the president could once again use what they have said in other instances is his constitutional authority to act outside the regulations set by Congress").

For these reasons, neither the government's voluntary decision to seek now-vacated FISC approval of the NSA Program nor its decision to abide by the terms of the soon-to-expire Protect America Act makes this case moot. Although the Protect America Act expanded the government's ability to engage in warrantless foreign intelligence surveillance, it is set to lapse on February 4, 2008. When the law lapses FISA's original restrictions on the President's surveillance power will once again be in force. There are a number of pending bills that would replace the Protect America Act and amend FISA, but there is no guarantee that Congress will actually enact any of those bills. More importantly, each of the pending bills would impose more restrictions on the government's surveillance power than does the Protect America Act. *See* H.R. 3773, 110th Cong. (2007); S. 2248, 110th Cong. (2007) (Sen. Judiciary Comm.); S. 2248, 110th Cong. (2007) (Sen. Intelligence Comm.). In fact, each bill would require

judicial oversight (in some form) and minimization – the very constraints the President has disregarded in the past. *See* Pet. at 27; The Association of the Bar of the City of New York et al. as *amicus curiae* Supporting Petitioners, *ACLU v. NSA*, No. 07-468 (2007) ("*Amicus Brief*") at 11-14.

While the Program has been suspended, the President is "free to return to his old ways." Accordingly, the question whether the President possesses authority under Article II to disregard FISA remains a live one.[2]

II. THIS COURT SHOULD GRANT REVIEW TO MAKE CLEAR THAT INDIVIDUALS WHO SUFFER CONCRETE INJURY BECAUSE OF GOVERNMENT SURVEILLANCE MAY SEEK REDRESS IN COURT

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[2] If this Court agrees with the government that the case is moot, it should grant the writ, vacate the judgment and remand to the court of appeals with instructions to dismiss the case as moot. *Citizens Preserving America's Heritage, Inc. v. Harris*, 515 U.S. 1155 (1995) (granting petition, vacating judgment, and remanding to court of appeals to dismiss as moot); *see also* Robert L. Stern, et al., Supreme Court Practice 327 & n.116 (8th ed. 2002) (collecting cases). Vacating the court of appeals' judgment will ensure that its decision is not res judicata for a future challenge to the government's surveillance. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950) (vacating judgments when case becomes moot on appeal "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance," thus "the rights of all parties are preserved"); *see also* BIO at 20 ("If petitioners . . . wish to file a suit challenging the PAA, they are free to do so.")

The government's brief only underscores the need for this Court's guidance on the issue of standing. In support of their motion for summary judgment, plaintiffs submitted copious evidence that they had suffered concrete injury because of the Program. The government did not contest this evidence. Instead, it contended in the trial court, as it contended in the Sixth Circuit and now contends here, that plaintiffs' injuries are not cognizable under Article III. There is no merit to this argument, and this Court should grant review to make this clear.

Plaintiffs have suffered concrete, real, and ongoing professional injuries because of the Program. Pet. at 4-6. The attorney-plaintiffs, in particular, have provided ample evidence that they have been injured by surveillance that has been conducted without judicial supervision and without compliance with statutorily required minimization procedures. Pet. at 175a (Gilman, J., dissenting). The government does not dispute the veracity of the attorney-plaintiffs' allegations or the reasonableness of the actions they have taken to ensure that they honor their ethical obligations to their clients. Rather, the government argues that plaintiffs' injuries are self-inflicted and therefore insufficient to confer standing. BIO at 13. But the attorney-plaintiffs' "choice" to refrain from communicating with clients or potential witnesses because of unlawful government surveillance is no choice at all.

As explained in the *Amicus Brief* and in the expert affidavit of Leonard Niehoff, these attorneys have an ethical obligation to provide competent, diligent, and zealous representation to their clients while also maintaining the confidentiality of

information relating to that representation. Pet. at 334a-335a (Niehoff Decl. ¶¶ 12, 16); *Amicus Brief* at 16-17. The government's surveillance activities trap these plaintiffs in an ethical dilemma – either discontinue their telephonic and/or electronic communications and risk violating their obligation to competently represent their clients, or continue communicating at the risk of violating their obligation to take all reasonable steps to preserve client confidences. Pet. at 336a-337a (Niehoff Decl. ¶ 19); *Amicus Brief* at 18. The injuries that plaintiffs have suffered are real and concrete and, notwithstanding the government's arguments, sufficient to confer standing.[3]

Furthermore, the government's brief highlights what petitioners themselves have emphasized: that there is considerable confusion about the circumstances in which litigants have standing to challenge the government's surveillance activities. The government insists that plaintiffs do not have standing to challenge government surveillance unless they can show that they were targeted under the Program. But, at the same time, the government invokes the state secrets privilege to ensure that this showing is impossible to make. Whether plaintiffs have the right to challenge government surveillance should not turn the government's willingness to be sued. It should turn,

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[3] The government repeatedly asserts that petitioners did not contest the government's invocation of the state secrets privilege. *See, e.g.*, BIO at 9. Petitioner's position is that the public record in this case is sufficient to establish standing without the need to resort to any information that the government has sought to protect under the state secrets privilege.

rather – as it does in every other context – on whether the plaintiffs have suffered concrete injury because of the actions they challenge. Pet. at 19-27.

The government suggests that the Court need not grant review in this case because litigants in other cases will have standing to challenge the Program. BIO at 14-15. This suggestion is disingenuous. The legality of the Program has been challenged in nearly 50 different civil suits, but each case the government has invoked the state secrets privilege and moved to dismiss on the ground that the plaintiffs could not prove with certainty that their communications had been monitored under the Program.[4]

Nor is it likely that the Program's lawfulness will be reviewed in the context of a criminal prosecution. The government has consistently refused to disclose to criminal defendants whether their communications were intercepted under the Program, whether FISA warrants were obtained based on information obtained through the Program, or whether evidence obtained through the Program

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[4] With the exception of the ACLU's suit, these cases have been consolidated as Multi-District Litigation in the Northern District of California. Joint Case Management Statement, *In re Nat'l Sec. Agency Telecommunications Records Litig.*, No. 06-1791 (J.P.M.L. Nov. 17, 2006) (hereinafter "Case Management Statement"); *see also* Case Management Statement at 6, 26 (discussing the government's state secrets and standing arguments). In defense of its standing theory, the government has filed two appeals to the Ninth Circuit. *See Hepting v. AT & T Corp.*, 439 F. Supp. 2d 974, 995 (N.D. Cal. 2006), *appeal docketed*, Nos. 06-171321, 06-17137 (9th Cir. 2006); *Al-Haramain v. Bush*, --- F.3d ---, 2007 WL 3407182 (9th Cir. Nov. 16, 2007).

otherwise affected their prosecution. Indeed, the government took this position in one New York prosecution – the prosecution of Yassin Aref and Mohammed Hossain – even after government officials stated to the press that the prosecution had been made possible because of the Program. *See* Lowell Bergman, Eric Lichtblau, Scott Shane and Don Van Natta Jr., *Spy Agency Data after Sept. 11 Led FBI to Dead Ends*, N.Y. Times, Jan. 17, 2006.[8] Last week, the government filed a brief with the Second Circuit Court of Appeals defending its refusal in that case to disclose whether defendants were targets of the Program. It argued that defendants had "failed to identify any specific evidence" obtained illegally; that "the mere fact of interception is protected by the state secrets/classified information privilege"; and that even to admit the *lack* of NSA surveillance would cause harm. *United States v. Aref*, No. 07-981, pp. 180, 182 (2d Cir. Dec. 13, 2007) (Brief for Appellee). To petitioners' knowledge, the government has never disclosed to *any* criminal defendant that she was (or was not) targeted under the Program. The government's contention that a criminal case would provide a better vehicle than this case to challenge the Program's lawfulness is

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[8] Instead, the government responded to defendants' motion to suppress with a sealed, *ex parte* filing, *see United States v. Aref*, No. 04-0402, Dkt. No. 205, (N.D.N.Y., Mar. 10 2006) (Notice of Submission of *In Camera, Ex Parte*, Classified Memorandum and Response to Defendant's Motion for Reconsideration), and the court denied the motion in a four-sentence order indicating that a sealed, *ex parte* opinion and order regarding the motion had been lodged with the Clerk of Court, *see United States v. Aref*, No 04-0402, Dkt. No. 206 (N.D.N.Y., Mar. 10, 2006) (Order Denying Motion for Reconsideration).

thus contradicted by the contrary position that the government has taken in actual litigation.

In the government's view, the President's inherent authority to conduct warrantless surveillance in the name of national security is both unlimited and unreviewable. That is not the law nor should it be. Having suffered concrete injury as a result of the government's unlawful surveillance, petitioners have amply demonstrated their standing to challenge the scope of the government's asserted authority.[6]

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[6] The government argues that the legality of the TSP is not properly raised in the petition for certiorari "because the court below did not reach that question." BIO at 9. It is well established, however, that "[a]ny issue *pressed* or passed upon below by a federal court is subject to this Court's broad discretion over the questions it chooses to take on certiorari." *Verizon Commchs, Inc. v. FCC*, 535 U.S. 467, 530 (2002) (quotation marks and citation omitted) (emphasis added); *accord United States v. Wells*, 519 U.S. 482, 488 (1997) ("we may address a question properly presented in a petition for certiorari if it was pressed [in] or passed on by the Court of Appeals") (quotation marks omitted; alteration in original). Here, almost half of the ACLU's brief in the court of appeals challenged the merits of TSP program. Pltfs. C.A. Br. at 20-53, *available at* 2006 WL 4055617. Because the ACLU pressed the merits of the TSP in the court of appeals, its challenge is properly presented for this Court's review.

CONCLUSION

The petition for a writ of *certiorari* should be granted for the reasons stated above and in the petition

Respectfully submitted,

JAMEEL JAFFER
Counsel of Record
MELISSA GOODMAN
STEVEN R. SHAPIRO
American Civil
Liberties Union Fdn.
125 Broad Street
New York, NY 10004
(212) 549-2500

MICHAEL J. STEINBERG
KARY L. MOSS
American Civil
Liberties Union
Fund of Michigan
60 West Hancock Street
Detroit, MI 48201-1343
(313) 578-6814

RANDAL L. GAINER
KRISTINA SILJA BENNARD
Davis Wright
Tremaine LLP
1201 Third Avenue
Seattle, WA 98101-3045
(206) 757-8047

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AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Petitioners,

—v.—

NATIONAL SECURITY AGENCY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR *AMICI CURIAE* THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, BAR ASSOCIATION OF SAN FRANCISCO, BEVERLY HILLS BAR ASSOCIATION, BOSTON BAR ASSOCIATION, THE LOS ANGELES COUNTY BAR ASSOCIATION, AND THE PHILADELPHIA BAR ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

THEODORE K. CHENG
Counsel of Record
PROSKAUER ROSE LLP
1585 Broadway
New York, New York 10036-8299
(212) 969-3000

(Additional Counsel Listed On Inside Cover)

November 8, 2007

PETER T. BARBUR
Chair, Committee on
Civil Rights
The Association of the Bar
of the City of New York
42 West 44th Street
New York, New York 10036
(212) 382-6600

Counsel for Amicus Curiae
The Association of the Bar
of the City of New York

AMITAI SCHWARTZ
Co-Chair, Amicus Curiae
Committee
Bar Association of
San Francisco
2000 Powell Street, Ste. 1286
Emeryville, California 94608
(510) 597-1775

Counsel for Amicus Curiae
Bar Association of San
Francisco

CINDY TOBISMAN
Chair, Amicus Committee
300 South Beverly Drive
Suite 201
Beverly Hills, California
90212
(310) 601-BHBA

Counsel for Amicus Curiae
Beverly Hills Bar
Association

MITCHELL H. KAPLAN
Chair, Amicus Committee
Boston Bar Association
16 Beacon Street
Boston, Massachusetts 02108
(617) 742-0615

Counsel for Amicus Curiae
Boston Bar Association

RICHARD A. ROTHSCHILD
3701 Wilshire Blvd., Suite 208
Los Angeles, California 90010-2809
(213) 487-7211

Counsel for Amicus Curiae
The Los Angeles County Bar
Association

JANE LESLIE DALTON
Chancellor
The Philadelphia Bar Association
1101 Market Street, 11th Floor
Philadelphia, Pennsylvania 19107
(215) 238-6300

Counsel for Amicus Curiae The
Philadelphia Bar Association

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INTERESTS OF *AMICI CURIAE*[1]

The Association of the Bar of the City of New York

Founded in 1870, the Association of the Bar of the City of New York (the "NYC Bar"), is a professional organization of more than 22,000 attorneys. Through its many standing committees, such as its Committee on Civil Rights, the NYC Bar educates the Bar and the public about legal issues relating to civil rights, including the right of access to the courts and the right to counsel. The NYC Bar also seeks to promote effective assistance of counsel for everyone and is especially concerned with protecting the confidentiality of attorney-client communications as essential to such representation.

Over the past several years, the NYC Bar has attempted to demonstrate by various means that individual liberties need not be subverted by governmental power during times of war, and that national security can be achieved without prejudice to constitutional rights that are at the heart of our democracy. Of particular relevance here, the NYC Bar co-sponsored the resolution adopted by the House of Delegates of the American Bar Association in February 2006, urging the President to halt the

---

[1] Counsel of record for Petitioners and Respondents were timely notified of the intent to file this brief under S. Ct. R. 37.2(a) and have consented to its filing; their consent letters have been filed with the Clerk of the Court. No counsel for a party in this Court authored this brief, in whole or in part, and no party in this Court or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

surveillance program being conducted by the National Security Agency ("NSA") and instead, if necessary, work with Congress to amend the Foreign Intelligence Surveillance Act of 1978 ("FISA") in a way that would accommodate national security interests while also protecting individual rights. The NYC Bar also sent letters to Congress, opposing passage of the Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (2007) ("PAA"), and commenting upon pending bills in Congress that would replace the PAA. The NYC Bar filed a brief as *amicus curiae* in both the District Court and the Court of Appeals in this action.

Bar Association of San Francisco

The Bar Association of San Francisco ("BASF") is a voluntary association of more than 8,000 attorneys. The majority of its members live and work in the City and County of San Francisco, California. Through its board of directors, its committees, and its volunteer programs, BASF has consistently worked for many years to protect against government abuses and to promote public accountability of law enforcement agencies. BASF has also actively worked to promote unfettered communications between lawyers and clients. BASF believes that the NSA surveillance program at issue in this case undermines public accountability and poses a substantial threat to lawyer-client relations because it bypasses the systems of restraint and accountability required by FISA and the United States Constitution.

The Beverly Hills Bar Association

The Beverly Hills Bar Association (the "BHBA") has 4,000 members. For more than seventy years, the BHBA has dedicated itself to the advancement of the rule of law, civil rights, equal access to the courts, and judicial independence. This case involves crucial issues regarding the BHBA's historical concerns: Whether any branch of our federal government is unaccountable and above the rule of law? And, whether judicial review of executive actions can be unilaterally curtailed because of an undeclared "war on terrorism"?

Boston Bar Association

The Boston Bar Association (the "BBA") is the nation's oldest bar association, the direct successor to the earliest bar association in Boston founded by John Adams in 1761. The mission of the BBA is to advance the highest standards of excellence for the legal profession, facilitate access to justice, and serve the community at large. Throughout its history, the BBA has advocated for the preservation of the attorney-client privilege as an essential component of our adversarial system of justice. Allowing clients to communicate privately with their lawyers enables clients to secure meaningful access to the justice system. Legal representation is impaired if lawyers and their clients cannot communicate openly because of fear that the government may be listening. The BBA opposes any intrusions on the attorney-client privilege that would exceed the settled and narrow exceptions already established in American jurisprudence.

The Los Angeles County Bar Association

The Los Angeles County Bar Association ("LACBA"), with more than 25,000 members, is the largest local voluntary bar association in the country. For more than 125 years, LACBA has played an important role in the professional lives of lawyers and in the lives of the people of Los Angeles County.

LACBA, through its Professional Responsibility and Ethics Committee and other avenues, has consistently supported the sanctity of attorney-client communications, especially against government intrusion. *See, e.g., United States v. Legal Services for New York City*, 249 F.3d 1077 (D.C. Cir. 2001) (action by LACBA and other bar associations opposing government attempts to subpoena information that could identify legal services clients by name and legal problems).

LACBA has also played an important role in educating the public about the importance of maintaining civil liberties in the fight against terrorism. For example, the Dialogues on Freedom program, held annually since September 11, 2002, facilitates high school students' discussion of American freedoms and constitutional rights and highlights differences from non-democratic governments.

As the practices of the NSA challenged here threaten the attorney-client relationship and basic civil liberties, LACBA joins its fellow bar associations in supporting Petitioners.

The Philadelphia Bar Association

The Philadelphia Bar Association (the "PBA"), founded in 1802, is America's first chartered metropolitan bar association. A voluntary association, it presently has 13,000 members representing all elements of the legal profession, including some of the nation's most prominent lawyers, judges, public servants, business, and civic and community leaders, in the city where this country was born. Its commitment to liberty and justice for all lies at the heart of the PBA's mission: to serve the profession and the public by promoting justice, professional excellence, and respect for the rule of law. In so doing, the PBA strives to foster understanding of, involvement in, and access to the justice system.

Since the tragic events of September 11, 2001, the PBA has repeatedly expressed its concerns to our federal government about the abridgement of constitutional rights in the name of the "War on Terror." Although the PBA understands the very real danger of terrorism in this day and age, in times like this, the power of the Executive Branch must be reasonably restrained so as to remain consistent with the protection of our country. Unchecked, such power will cause the Constitution to be terrorism's next victim.

SUMMARY OF ARGUMENT

Amici curiae submit this brief to highlight the actual injury caused by unchecked government surveillance – whether conducted under the NSA's Terrorist Surveillance Program (the "Program") or under the PAA – on the relationship between attorneys and clients who are suspected of having ties to terrorism or terrorist organizations. As set forth below, the NSA's admitted practice of wiretapping communications in the name of national security – without a court order and pursuant to undisclosed standards never subjected to judicial scrutiny – places attorneys in the untenable ethical dilemma of choosing between diligently and competently representing their clients or protecting the confidentiality of the communications with them. The erroneous decision by the Sixth Circuit fails to acknowledge the injury inflicted upon the attorney-petitioners by the threat of government surveillance without meaningful judicial oversight.

Justice requires that persons accused by the Government of wrongdoing have access to legal advice, and that legal advice can only be effective if communications between attorneys and their clients are conducted in confidence, uninhibited by fears that government agents are listening in. The Executive Branch's legitimate national security concerns can be accommodated without compromising individual rights, and those who are injured by government surveillance – whether conducted under statutory authority or in violation of a statute – should be permitted to challenge the lawfulness of that surveillance in a court of law.

Otherwise, fundamental rights will be impermissibly and unnecessarily undermined. The attorney-petitioners have plainly suffered a special and unique harm due to the Government's unchecked surveillance, which must be subject to judicial review so that those injuries can be remedied.

ARGUMENT

I. The Court Should Grant Review to Reinforce the Fundamental Principle of Preserving the Confidentiality of Attorney-Client Communications

The principle that attorney-client communications are entitled to confidentiality is deeply rooted in our legal system. Courts have long recognized that disclosures made by clients to their attorneys to obtain legal advice are protected with a "seal of secrecy." *See, e.g., Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) ("The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."). Thus, "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citation omitted).

The purpose of such confidentiality "is to encourage full and frank communication between

attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.*; *see also Fisher v. United States*, 425 U.S. 391, 403 (1976) ("[I]f the client knows that damaging information could . . . be obtained from the attorney following disclosure . . ., the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."). As this Court has noted, the attorney-client privilege recognizes the basic principle "that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn*, 449 U.S. at 389; *accord* App. 25a (District Court remarking that "[t]he ability to communicate confidentially is an indispensable part of the attorney-client relationship").

The dangers of unchecked government surveillance are particularly problematic in the attorney-client context. For example, such practices impact the right of meaningful access to the courts – an aspect of the First Amendment right to petition the government. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). The right to assistance of counsel, including the right to confidential attorney-client communications, is an integral part of that right. *See, e.g., Goodwin v. Oswald*, 462 F.2d 1237, 1241 (2d Cir. 1972) (noting that prison inmates, who have fewer First Amendment rights than non-incarcerated persons, possess the rights to access the courts, to have assistance of counsel, and to have "the opportunity for confidential communication between attorney and client").

This Court has also held that, for groups that are forced to resort to the courts to redress disparate treatment at the hands of the Government, the First Amendment protects the right to pursue litigation. *See, e.g., NAACP v. Button*, 371 U.S. 415, 428-30 (1963). The attorneys who represent these groups and challenge what they believe to be unlawful government policies similarly engage in a form of protected political expression. *Id.*; *see also In re Primus*, 436 U.S. 412, 432 (1978) ("The First and Fourteenth Amendments require a measure of protection for 'advocating lawful means of vindicating legal rights,' including 'advis[ing] another that his legal rights have been infringed . . . .") (citations omitted).

Many of the likely targets of the Government's unchecked surveillance have been accused by the United States of somehow having ties to terrorism and are vigorously protesting their innocence against the Government. But "the efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants." *Primus*, 436 U.S. at 431. Thus, surveillance without meaningful judicial oversight seriously inhibits the ability of these persons effectively to litigate because it erects barriers to communications with their attorneys, as well as barriers to communications between their attorneys and witnesses and others who reside outside the United States. *See, e.g., Turkmen v. Ashcroft*, Nos. 02 CV 2307 (JG), 04 CV 1809 (JG), 2006 WL 4483151, at *1 (E.D.N.Y. Oct. 3, 2006) (noting that "it is a cardinal rule of litigation that one side may not eavesdrop on the other's privileged

attorney-client communications," and that "[l]itigation involving officials of the executive branch of government is no exception"). These barriers curtail the speech and expression of those attorneys as well. *See Button*, 371 U.S. at 447-48 (White, J., concurring in part and dissenting in part) (finding constitutionally protected the activities of NAACP staff lawyers in, among other things, "advising Negroes of their constitutional rights").[2]

Notably, FISA recognizes the importance of preserving the confidentiality of attorney-client communications. First, FISA provides that "[n]o otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this subchapter shall lose its privileged character." 50 U.S.C. § 1806(a). Thus, to the extent that privileged communications between attorneys and clients are intercepted, they retain their privileged status, and neither the privileged communications

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[2] It is also well settled that the privacy of attorney-client communications is critical to the effective assistance of counsel guaranteed by the Sixth Amendment. *See, e.g., United States v. Chavez*, 902 F.2d 259, 266 (4th Cir. 1990) ("[A] critical component of the Sixth Amendment's guarantee of effective assistance is the ability of counsel to maintain uninhibited communication with his client and to build a 'relationship characterized by trust and confidence.'") (quoting *Morris v. Slappy*, 461 U.S. 1, 21 (1983)). By threatening the sanctity of the attorney-client relationship, unchecked government surveillance burdens all communications between those who "perceive[ ] themselves, whether reasonably or unreasonably, as potential targets" of surveillance and their attorneys. S. Rep. No. 95-604, at 8 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3908 (hereinafter, "Legislative History").

nor their fruit can be used in court.[3] This strict prohibition alone deters the wiretapping of communications between attorneys and clients because future prosecutions based on evidence obtained from illegal wiretaps could be compromised.

Second, FISA generally requires prior judicial approval for electronic surveillance conducted for foreign intelligence purposes. *See generally* 50 U.S.C. § 1805. However, before issuing a surveillance "order" (FISA's equivalent of a warrant), a FISA court judge must find that the Government has adopted "minimization procedures," *see id.* § 1805(a)(4), that are "reasonably designed . . . to minimize the acquisition and retention . . . of nonpublicly available information concerning unconsenting United States persons," *id.* § 1801(h)(1). The NSA's Legal Compliance and Minimization Procedures manual, which was last modified in 1993 and governed the agency at least until the enactment of the PAA, specifically dealt with the wiretapping of attorney-client communications:

> As soon as it becomes apparent that a communication is between a person who is known to be under criminal indictment

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[3] Under FISA, individuals must be given notice if the Government intends to use the fruits of any such surveillance against a person in a criminal proceeding, and the defendant can then move to suppress the evidence. *See* 18 U.S.C. § 2518(9)-(10); 50 U.S.C. § 1806(c) & (e); *see generally United States v. Belfield*, 692 F.2d 141, 144-46 (D.C. Cir. 1982).

> and an attorney who represents that individual in the matter under indictment (or someone acting on behalf of the attorney), *monitoring of that communication will cease* and the communication shall be identified as an attorney-client communication in a log maintained for that purpose. The relevant portion of the tape containing that conversation will be placed under seal and the Department of Justice, Office of Intelligence Policy and Review, shall be notified so that appropriate procedures may be established *to protect such communications from review or use in any criminal prosecution*, while preserving foreign intelligence contained therein.

Legal Compliance and Minimization Procedures, USSID 18, Annex A, App. 1 § 4(b) (Jul. 27, 1993), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB23/07-01.htm (emphases added).

These minimization procedures recognize that the confidentiality of attorney-client communications is vital to rendering effective assistance of counsel. The provisions, moreover, have been a part of FISA since its original enactment in 1978, and they remain unaltered after the tragedies of September 11, 2001

but for a critical change introduced by the PAA with respect to international communications.

Both the Program and the PAA raise special concerns for attorneys because they do not generally require minimization procedures under the circumstances faced by the attorney-petitioners. The PAA allows the Government to conduct warrantless foreign intelligence surveillance if it is either (a) "directed at" or (b) "concerns" individuals who are "reasonably believed to be outside the United States." *See* App. 251a (PAA § 2; inserting new §§ 105A and 105B). Significantly, the PAA makes a critical distinction between these two types of surveillance, in that the PAA explicitly amended the definition of "electronic surveillance" under FISA to exclude surveillance "directed at a person reasonably believed to be outside the United States." *See id.*

The import of this change is that surveillance "directed at" communications between, for example, the attorney-petitioners and individuals overseas, when characterized as being "directed at" the individual located outside of the United States, are completely relieved of the minimization requirements mandated by FISA because, by definition, those communications do not constitute "electronic surveillance."[4] Even where the monitored

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[4] By contrast, if the surveillance "concerns persons reasonably believed to be outside of the United States," the Government is required to determine, among other things, whether "the minimization procedures to be used with respect to such acquisition activity meet the definition of minimization procedures under section 101(h)" of FISA. App. 252a (PAA § 2). The Government can, without any difficulty, freely characterize

communications fall within § 105B, the statute relegates the FISA court to reviewing only the reasonableness of the procedures used by the Government to ensure that the intercepted communications do not constitute "electronic surveillance." *See* App. 259a (PAA § 3). Moreover, the court's review is "limited to whether the Government's determination is clearly erroneous." *Id.*

In short, the PAA gives the Government broad authority to intercept international communications, while simultaneously circumscribing the role of the FISA court to oversee that surveillance. Although the PAA was enacted with a sunset provision in February 2008 unless Congress enacts reauthorizing legislation, *see* App. 263a-264a (PAA § 6(c)), the Government has repeatedly insisted that the Executive Branch has the authority to disregard those consequences insofar as it constrains its ability to conduct foreign intelligence surveillance that it deems necessary in the interests of national security.

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the communications at issue in this case as falling within either § 105A or §105B, and, thus, it may sidestep any minimization procedures (and, thereby, continue pursuing unchecked surveillance) by always characterizing them to be "directed at" the individual located overseas, *i.e.*, within § 105A.

II. The Sixth Circuit's Decision Fails to Acknowledge the Actual Injury Caused by the Threat of Unchecked Government Surveillance

The attorney-petitioners claim actual and concrete injuries resulting from the failure of the Government's warrantless surveillance practices to comply with FISA's "minimization procedures" to protect attorney-client privileged communications from interception or, if intercepted, from subsequent disclosure. As explained below, these real injuries cause the attorney-petitioners to refrain from engaging in conduct that has potentially harmful consequences to their clients in order to comply with their professional obligations. By rooting its decision solely on whether the attorney-petitioners can provide evidence that they are personally subject to the Government's surveillance, *see, e.g.*, App. 85a, the Sixth Circuit failed to acknowledge this actual injury.

On behalf of their clients, the attorney-petitioners must communicate with clients, potential fact witnesses, experts, investigators, other lawyers, journalists, government officials, political figures, and other third-parties who live and work outside the United States about subjects such as terrorism, jihad, and al-Qaeda. Because of the Government's unchecked surveillance, the attorney-petitioners have ceased overseas telephone or e-mail communications about these and related issues. *See* App. 283a-288a (Hollander Decl. ¶¶ 13-25); App. 290a-295a (Swor Decl. ¶¶ 5-16); App. 304a-313a (Dratel Decl. ¶¶ 5-20); App. 321a-322a (Abdrabboh

Decl. ¶¶ 4-9); App. 325a-329a (Ayad Decl. ¶¶ 5-9, 11).[5]

The injury caused by the NSA's warrantless surveillance practices creates a serious dilemma for attorneys who represent clients outside of the United States accused of links to al-Qaeda (including organizations allegedly affiliated with or supporting al-Qaeda), as well as attorneys with clients outside the United States who have reason to perceive themselves within the potentially broad scope of the Government's surveillance practices. The seriousness of this ethical dilemma warrants this Court's attention.

Professional responsibility rules require an attorney to provide competent, diligent, and zealous representation to his or her client. *See* App. 333a-334a (Niehoff Decl. ¶¶ 8-11). For example, the American Bar Association's Model Rules of Professional Conduct ("Model Rules") – which comport with the professional responsibility rules of many states – require an attorney to provide

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[5] The District Court credited these declarations, noting that the Program had "caused clients . . . to discontinue their communications with plaintiffs out of fear that their communications will be intercepted." App. 25a. The court also observed that attorneys now bore increased financial burdens "in having to travel substantial distances to meet personally with their clients and others relevant to their cases." *Id.* In sum, the court opined that the Government's surveillance practices had "significantly crippled" lawyers in their ability to "competently and effectively represent their clients," App. at 28a, thereby saddling clients (and lawyers who agree to represent clients on a *pro bono* basis) with extraordinary and unnecessary expenses.

competent representation to the client, including the "thoroughness and preparation reasonably necessary for the representation." Model Rule 1.1. Under Model Rule 1.4, an attorney also owes the client a duty of communication, pursuant to which he must "reasonably consult with the client about the means by which the client's objectives are to be accomplished." This communication is paramount to the attorney-client relationship because "[r]easonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation." *Id.* 1.4 cmt. ¶ 1.

These same professional responsibility rules also require an attorney to maintain the confidentiality of information relating to the representation of the client. *See id.* 1.6; *see also* App. 334a-335a (Niehoff Decl. ¶¶ 12-14). This ethical obligation is expansive and is substantially broader than the attorney-client privilege. *See* Model Rule 1.6 cmt. ¶ 3 ("The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."); *see also* App. 334a (Niehoff Decl. ¶ 12).

The attorney's fundamental duty of confidentiality "contributes to the trust that is the hallmark of the client-lawyer relationship" and encourages clients "to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." Model Rule 1.6 cmt. ¶ 2. By fostering a relationship of trust between the attorney and the client, preventing the misuse of information learned

in the course of the representation, and protecting attorney work-product from unwanted disclosure, this duty is central to the functioning of the attorney-client relationship and to effective representation. *See* App. 334a (Niehoff Decl. ¶ 12).

The lack of meaningful judicial review over the Government's surveillance practices places attorneys whose obligations require them to communicate with potential overseas targets of the Government's warrantless surveillance in a difficult ethical dilemma: either (a) discontinue their telephonic and electronic communications with these clients and risk violating their obligations of competence and candor, or (b) continue communicating with these clients at the risk of violating their professional obligation to take all reasonable steps to protect client confidences. In its decision below, the District Court credited the declaration of legal ethics professor Leonard M. Niehoff, who elaborated on this dilemma:

> On one hand, proceeding with these electronic and telephonic communications would create a substantial risk of disclosure of information deemed confidential by the ethics rules. On the other hand, failing to proceed with these communications would create a substantial risk of noncompliance with duties of diligence, competence, zealous representation, and thorough preparation. An attorney may

> be able to avoid this conflict by traveling oversees and conducting in-person interviews of individuals who have relevant personal knowledge. Such an approach, however, may not always be possible, and, when possible, will burden the representation with gross inefficiencies, substantially increased costs, and significant logistical difficulties. In sum, the [ ] Program requires the attorneys to cease – immediately – all electronic and telephonic communications relating to the representation that they have good faith reason to believe will be intercepted. And the [ ] Program requires the attorneys to resort – immediately – to alternative means for gathering information that, at best, will work clumsily and inefficiently and, at worst, will not work at all.

App. 336a-337a (Niehoff Decl. ¶ 19).

Thus, government surveillance without meaningful judicial oversight makes in-person communication virtually the only means by which attorneys and clients reasonably can be assured that their dialogue will remain confidential. Practically, however, such meetings, when compelled to take

place abroad, may become so burdensome, costly, and ineffective that *all* effective communications are curtailed.

The lack of minimization requirements under both the Program and the PAA, in contrast to the procedures mandated under FISA, only serve to highlight this dilemma. Pre-amended FISA established a detailed procedure permitting the Government to intercept international communications "without violating the rights of citizens of the United States." *United States v. Hammoud*, 381 F.3d 316, 332 (4th Cir. 2004) (*en banc*), *vacated on other grounds*, 543 U.S. 1097, *reinstated in part*, 405 F.3d 1034 (2005). *See also* 50 U.S.C. §§ 1801(h), 1821(4). FISA's minimization procedures are meant to parallel the procedures found in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.* ("Title III"), "which courts have sensibly construed as not requiring the total elimination of innocent conversation." *United States v. Rosen*, 447 F. Supp. 2d 538, 551 (E.D. Va. 2006) (citation omitted).[6] Under Title III, a court's role in

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[6] In pertinent part, Title III's minimization procedures provide:

> Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

18 U.S.C. § 2518(5).

assessing the Government's minimization efforts is to determine whether "on the whole the agents have shown a high regard for the right of privacy and have done all they reasonably could to avoid unnecessary intrusion." *United States v. Tortorello*, 480 F.2d 764, 784 (2d Cir. 1973).

Congress intended the minimization procedures in FISA "to act as a safeguard for U.S. persons at the acquisition, retention and dissemination phases of electronic surveillance and searches." *Rosen*, 447 F. Supp. 2d at 550-51 (citation omitted). Thus, "[a]bsent a charge that the minimization procedures have been disregarded completely, the test of compliance is 'whether a good faith effort to minimize was attempted.'" *United States v. Thomson*, 752 F. Supp. 75, 80 (W.D.N.Y. 1990) (quoting *United States v. Armocida*, 515 F.2d 29, 44 (3d Cir. 1975)).

Even before FISA was enacted, in *United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297 (1972) (hereinafter, "*Keith*"), this Court had already noted – in the context of addressing warrantless wiretapping for domestic intelligence purposes, but in words equally applicable here – the degree to which unchecked surveillance is inconsistent with constitutional guarantees:

> The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect "domestic security."

> Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.

Id. at 314. This Court in *Keith* also underscored the inherent danger of permitting the acts of the Executive to proceed without meaningful oversight:

> The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech. . . . The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised.

407 U.S. at 317 (citation and footnote omitted).[7]

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[7] *See also Scott v. United States*, 436 U.S. 128, 137 (1978) ("'The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.'") (quoting *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968)); *Zweibon v. Mitchell*, 516 F.2d 594, 635-36 (D.C. Cir. 1975) ("To allow the Executive Branch to make its own determinations as to such matters invites abuse, and public

The legislative history of FISA further demonstrates that Congress shared this Court's view in *Keith* that warrantless searches by an unchecked Executive raised the specter of abuse, especially given the documented history of abuse in this area:[8]

> The exercise of political freedom depends in large measure on citizens' understanding that they will be able to be publicly active and dissent from official policy, within lawful limits, without having to sacrifice the expectation of privacy that they rightfully hold. Arbitrary or uncontrolled use of warrantless electronic surveillance can violate that understanding and impair that public confidence so

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knowledge that such abuse is possible can exert a deathly pall over vigorous First Amendment debate on issues of foreign policy.").

[8] For example, Congress was informed that past subjects of surveillance "ha[d] included a United States Congressman, Congressional staff member, journalists and newsmen, and numerous individuals and groups who engaged in no criminal activity and who posed no genuine threat to the national security, such as two White House domestic affairs advisers and an anti-Vietnam War protest group'" Legislative History at 8 (internal quotations and citation omitted). Furthermore, claims of national security had sometimes been used to justify warrantless wiretapping of members of the Democratic Party, ostensibly because the Executive Branch had boundlessly defined the term "dissident group." *United States v. Falvey*, 540 F. Supp. 1306, 1309 (E.D.N.Y. 1982).

> necessary to an uninhibited political life.

Legislative History at 8.

By contrast, under the Program, no minimization procedures were required; and under the PAA, minimization requirements are only mandated under severely limited circumstances.[9] Moreover, even when minimization requirements are mandated under the PAA, the FISA court's role is relegated to reviewing only whether the Government's determination – that reasonably designed procedures were used to ensure that the intercepted communications do not constitute electronic surveillance – was clearly erroneous. *See* App. 259a (PAA § 3).

Thus, the Government's current warrantless surveillance practices as to international communications do not require any minimization procedures whatsoever. And when the Government is free to disregard any minimization requirements when conducting surveillance, individuals such as the attorney-petitioners here have only the Government's assertions of "good faith" that any efforts at all were made to minimize the monitoring of privileged communications. *Cf. Thomson*, 752 F. Supp. at 80 ("Absent a charge that the minimization procedures have been disregarded completely, the

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[9] *See supra* note 4 and accompanying text (discussing inherent ease with which the Government can sidestep any minimization procedures required under the PAA by simply characterizing the communications at issue to serve its interests).

test of compliance is whether a good faith effort to minimize was attempted.") (internal quotations and citation omitted).

The lack of any true minimization requirements under either the Program or the PAA have interfered, and will continue to interfere, with the ability of attorneys to meet their professional obligations by placing them in the middle of an ethical quandary, thereby giving rise to an actual injury. Without doubt, unchecked government surveillance raises serious ethical concerns, as the District Court found. *See* App. 25a (finding that the Program poses "'an overwhelming, if not insurmountable, obstacle to effective and ethical representation'") (quoting App. 336a (Niehoff Decl. ¶ 19)); *see also* App. 335a ("In my opinion, the [ ] Program imposes an immediate, substantial, and gravely serious burden upon the representation being provided by these attorneys to their clients.") (Niehoff Decl. ¶ 16). Indeed, its pernicious effects may be even worse than currently realized because of the potentially vast (and unknown) scope of attorney-client communications being monitored.

Accordingly, the attorney-petitioners' apprehension that privileged communications are being improperly monitored is not only eminently reasonable, but an actual and immediate harm. *See, e.g., Turkmen v. Ashcroft*, Nos. 02 CV 2307 (JG), 04 CV 1809 (JG), 2006 WL 4483151, at *1 (E.D.N.Y. Oct. 3, 2006) (holding that the plaintiffs' request for further assurances is reasonable in view of, among other things, the Government's claim that it has "the authority – indeed, the necessity – to monitor

suspected terrorists abroad making electronic communications into the United States, and to do so without any judicial oversight"). Thus, because the threat of government surveillance causes these injuries, it must be subject to judicial review so that these injuries can be remedied.

The attorney-petitioners present a specific, immediate, and special kind of harm flowing from the reasonable fear that unchecked government surveillance will intercept privileged communications, and not simply some generalized fear of the Government's future misuse of their intercepted communications. *See, e.g., id.* (stating that the plaintiffs "are fearful that under [the Program], . . . the defendants are listening to their privileged communications with their lawyers in the United States," and that "regardless whether the plaintiffs are actually involved in terrorist activity . . . they have reason to believe that the government thinks they are, and that they are therefore being monitored when they call the United States").

Moreover, as the dissenting opinion in the Sixth Circuit noted, *see* App. 187a, the attorney-petitioners amply demonstrated the connection between their injuries and the impact of government surveillance without meaningful judicial oversight. High-ranking government officials have publicly acknowledged that the surveillance practices involve intercepting communications where the Government "ha[s] a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in

support of al Qaeda." Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html. These parties are precisely the kind of clients that the attorney-petitioners represent, and, thus, the surveillance practices constitute a "genuine threat" of harm to them. *See Steffel v. Thompson*, 415 U.S. 452, 475 (1974).

Finally, as attorneys, these petitioners are uniquely situated from other potential challengers of the Government's warrantless surveillance practices because the nature of their injuries stem from their specific professional and ethical obligations, and, in particular, the vigilant application of the attorney-client privilege and the preservation of client confidences. Thus, the attorney-petitioners have more than sufficiently established a well founded fear that constitutes an "actual," "imminent," "concrete," and "particularized" harm resulting from the Government's unchecked surveillance practices.

CONCLUSION

For the foregoing reasons and the reasons presented by Petitioners, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

THEODORE K. CHENG
Counsel of Record
PROSKAUER ROSE LLP
1585 Broadway
New York, NY 10036-8299
(212) 969-3000

PETER T. BARBUR
Chair, Committee
on Civil Rights
The Association of the
Bar of the City of
New York
42 West 44th Street
New York, NY 10036
(212) 382-6600

Counsel for Amicus Curiae The Association of the Bar of the City of New York

MITCHELL H. KAPLAN
Chair, Amicus
Committee
Boston Bar Association
16 Beacon Street
Boston, MA 02108
(617) 742-0615

Counsel for Amicus Curiae Boston Bar Association

RICHARD A. ROTHSCHILD
3701 Wilshire Blvd.
Suite 208
Los Angeles, CA
90010-2809
(213) 487-7211

Counsel for Amicus Curiae The Los Angeles County Bar Association

AMITAI SCHWARTZ
Co-Chair, Amicus Curiae Committee
Bar Association of San Francisco
2000 Powell Street
Ste. 1286
Emeryville, CA 94608
(510) 597-1775

Counsel for Amicus Curiae Bar Association of San Francisco

CINDY TOBISMAN
Chair, Amicus Committee
300 South Beverly Drive
Suite 201
Beverly Hills, CA 90212
(310) 601-BHBA

Counsel for Amicus Curiae Beverly Hills Bar Association

JANE LESLIE DALTON
Chancellor
The Philadelphia Bar Association
1101 Market Street
11th Floor
Philadelphia, PA 19107
(215) 238-6300

Counsel for Amicus Curiae The Philadelphia Bar Association